LIBRARY
SUPREME COURT, U. S.

FILED
MAY 21 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 1419

H. K. PORTER COMPANY, INC.,

Petitioner,

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION NO. 22254, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PHILIP H. STRUBING,
2001 Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorney for Petitioner,
H. K. Porter Company, Inc.

PEPPER, HAMILTON & SHEETZ,
2001 Fidelity Building,
Philadelphia, Pennsylvania. 19109
PAUL R. OBERT,
1500 Porter Building,
Pittsburgh, Pennsylvania. 15219
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX.

	Page
Reports of Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statutes and Rules Involved	4
Statement	6
Reasons for Granting the Writ	18
Conclusion	27

TABLE OF CASES CITED.

Page

Atkinson v. Sinclair Refining Co., 370 U. S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962) 19

Commissioner v. Duberstein, 363 U. S. 278, 4 L. Ed. 2d 1218, 80 S. Ct. 1190 (1960) 21

Textile Workers v. Lincoln Mills, 353 U. S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957) 22, 23

United States v. Gypsum Co., 333 U. S. 364, 92 L. Ed. 746, 68 S. Ct. 525; *rehearing denied* 333 U. S. 869 (1948) ... 21

United Steelworkers of America v. American Mfg. Co., 363 U. S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960) 7, 22

United Steelworkers of America v. Enterprise Wheel & Car Co., 363 U. S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960) 7, 24, 26

United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U. S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960) 7, 19, 22, 23, 24

John Wiley & Sons, Inc. v. Livingston, 376 U. S. 543, 11 L. Ed. 2d 898, 84 S. Ct. 909 (1964) 22

Local 719, American Bakery & Confectionery Workers of America v. National Biscuit Company, 378 F. 2d 918 (3d Cir. 1967) 23

TABLE OF STATUTES AND RULES CITED.

Page

Statutes and Rules:

§ 203(d), Labor Management Relations Act of 1947, 61 Stat. 153, 29 U. S. C. § 173(d) 4, 22

§ 301(a), Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185(a) 4

Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. Rule 52 ..... 3, 21

REPORTS OF OPINIONS BELOW.

The opinion of August 4, 1960 of Judge John W. Lord, Jr. of the United States District Court for the Eastern District of Pennsylvania is reported at 190 F. Supp. 407 (E. D. Pa. 1960), and is printed herein as Appendix A.

The Order on this opinion entered April 11, 1961, following appeal as to form is unreported, and is printed herein as Appendix B.

The Decision and Award of Arbitrator W. Roy Buckwalter dated August 17, 1962 is unreported, and is printed herein as Appendix C.

The opinion of Judge John W. Lord, Jr. of May 10, 1963 is reported at 217 F. Supp. 161 (E. D. Pa. 1963), and is printed herein as Appendix D.

The opinion of June 19, 1964 of Circuit Judge Forman of the Court of Appeals for the Third Circuit is reported at 333 F. 2d 596 (3rd Cir. 1964), and is printed herein as Appendix E.

The Order and Judgment of December 7, 1964 of Judge John W. Lord, Jr. of the United States District Court for the Eastern District of Pennsylvania is unreported, and is printed herein as Appendix F.

The Opinion and Award of Arbitrator Donald A. Crawford dated April 15, 1967 is unreported, and is printed herein as Appendix G.

The Memorandum Opinion and Order of April 4, 1968 of Judge John W. Lord, Jr. is reported at 283 F. Supp. 739, 68 LRRM 2202 (E. D. Pa. 1968), and is printed herein as Appendix H.

The opinion of January 10, 1969 of Judge Freedman of the Court of Appeals for the Third Circuit is reported at 406 F. 2d 643, 70 LRRM 2385 (3rd Cir. 1969), and is printed herein as Appendix I.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 10, 1969. Court of Appeals Record, item 7, 8; Appendix I, *infra*. Rehearing was denied on February 20, 1969. Court of Appeals Record, item 10. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I. Did the Court of Appeals err in holding that a provision of the collective bargaining agreement limiting arbitration in pension matters to eligibility does not exclude from arbitration a further dispute as to when eligible employees' rights to payment accrued.

II. Whether a finding by the District Court based on supporting evidence may be set aside, contrary to the mandate of Rule 52, F. R. C. P.

III. Whether the federal labor policy requires that a party who participates in arbitration of issues of contested arbitrability be precluded from review of an award on such issues.

IV. Whether an award ordering payment of pensions to eligible employees without regard to their age may be enforced, where the collective bargaining agreement obligates the employer to pay pensions only to eligible employees who have reached age 65.

STATUTES AND RULE INVOLVED.

The statutes involved are Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties;

and Section 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 153, 29 U. S. C. § 173(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

The Rule involved is Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. Rule 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the

grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT.

A 1957 Collective Bargaining Agreement between Petitioner ("Porter") and Respondent ("Union") provided pension benefits for eligible employees integrated with Social Security benefits. Porter contracted to pay a basic yearly pension allowance to each retired employee who had reached the age of 65 with at least 25 years of continuous service with the company.*

> The pension section specifically provided that:
> [p]roblems of eligibility within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration.

The Contract elsewhere provided for arbitration of grievances of individuals or groups, with the parties reserving "broad labor policies or plant-wide wage adjustments" from the scope of their arbitration agreement.

The underlying dispute arose in 1959 when Porter announced its intention to move a substantial part of its production facilities in Philadelphia to Danville, Virginia. The Union claimed pension rights and severance pay for employees whose employment would be terminated by such move, and when no agreement was reached a grievance was filed.

In the ten years since the filing of the original grievance, aspects of this dispute have been considered by two arbitrators and on three occasions by both the District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit.

The present status, and the decision for which review is sought by this Petition, is the Order of the Court of Appeals of January 10, 1969. That decision directs enforcement of an arbitrator's award which, in part, orders

---

* Pertinent provisions of said contract appear in Appendix J.

immediate payment of pensions from date of termination to employees who had completed 25 years of service, without requiring that they first attain age 65; and awards pensions to a group of employees who had completed 24 years of service at termination payable upon completion of their 25th year (by exercise of the contract's seniority provision), again without requiring that they attain age 65. Some of the employees concerned were as young as 42 years of age at termination.

Enforcement of this award contravenes the substantive pension provisions and disregards the specific limitation that the only pension problems subject to arbitration are problems of eligibility.

The waystops between the filing of the grievance and the decision of the Court of Appeals which is the basis for this petition are as follows:

1. Porter objected to the arbitrability of the original grievances primarily on the ground that they constituted "broad labor policies" and were, therefore, excluded from arbitration. Following this Court's *Steelworkers* decisions,[1] however, the District Court directed arbitration. *United Saw Workers v. H. K. Porter Company, Inc.*, 190 F. Supp. 407 (E. D. Pa. 1960) (Appendix A, *infra*).

An appeal followed as to the form of the Order and the United States Court of Appeals for the Third Circuit on March 24, 1961 issued its Order No. 13439, settling the terms, pursuant to which the District Court entered the following Order:

> . . . that defendant is hereby ORDERED to conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the plaintiff, to

1. *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf N. Co.*, 363 U. S. 574 (1960); *United Steelworkers of America v. Enterprise W. & C. Co.*, 363 U. S. 593 (1960).

select an Impartial Chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof . . . (Appendix B, *infra*).

2. Thereafter, arbitration proceeded before Professor W. Roy Buckwalter who, on August 17, 1962, issued the following award:

> 1. Each employee who, at the time he was terminated, had completed twenty-five years of service or more, but had not reached age sixty-five shall be paid a full pension.
>
> The formula for payment to be worked out by H. K. Porter Company and the Union.
>
> Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.
>
> 2. Each employee who, at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.
>
> Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.
>
> 3. The request for pensions for employees who, at their termination, had not reached age sixty-five and who had not put in twenty-five years of service is denied. (Appendix C, *infra*).

3. Porter's efforts to have the Buckwalter award vacated were unsuccessful in the District Court. *H. K. Porter Company, Inc. v. United Saw Workers,* 217 F. Supp. 161 (E. D. Pa. 1963) (Appendix D, *infra*). The Court of Appeals affirmed as to Part 1 of the award, where in some 20 instances Porter's predecessor had waived the requirement of continuous service. But no such prior practice existed to justify Part 2 of the award, and therefore enforcement of that part was reversed. The case was remanded with instructions to enter judgment in favor of Porter insofar as Part 2 of the award was concerned. *H. K. Porter Company, Inc. v. United Saw Workers,* 333 F. 2d 596 (3rd Cir. 1964) (Appendix E, *infra*).

4. On December 7, 1964, the District Court entered an Order and Judgment which had been submitted by the parties. This Order and Judgment provided in part:

> 1. The Motions for summary judgment of plaintiff and defendant are granted in part and denied in part.
>
> 2. The arbitration award of Professor W. R. Buckwalter is hereby enforced as to paragraph 1 thereof . . .
>
> 3. Paragraph 2 of the arbitration award of Professor W. R. Buckwalter is vacated and declared void and unenforceable . . .
>
> 4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award as quoted above, then either party shall apply to this Court

under the above caption for such action as it deems appropriate. (Appendix F, *infra*).

5. At this stage, a class of employees undetermined in number who had 25 or more years of service at termination of their employment had been found to be eligible for pensions by the Buckwalter award as enforced by the Court of Appeals. Buckwalter, perhaps recognizing the contractual limitation on his authority as arbitrator, had framed the phrase "formula for payment" which he had suggested be worked out by the parties. The District Court had retained jurisdiction so that either party might apply for appropriate relief if such formula could not be worked out.

Many problems remained unresolved; some were problems of eligibility while some were not. The Union's claims included:

(a) employees found to be eligible under Part 1 of the Buckwalter award should be paid their full pensions effective as of the time of their termination;

(b) the contractual provisions for the minimum guaranteed pension were applicable in calculating the amount of each pension;

(c) the estates of eligible employees who had died since termination but prior to attaining age 65 should receive pension and insurance payments;

(d) employees who had concluded 24 years of service at termination were eligible under the Buckwalter award to receive full pensions upon completion of their twenty-fifth year of continuous service under the seniority provisions of the contract;

(e) four employees [Holmes, Shuttleworth, Norcross and Affatato] who had voluntarily left their employment prior to termination were eligible employees under Part 1 of the Buckwalter award;

(f) the pensions for eligible employees should be funded and administered jointly by Union and Management. (Appendix G, *infra*, p. 75a).

No application was made at this time to the District Court under its December 7, 1964 Order and Judgment; rather, the parties without any written submission voluntarily appeared before a second arbitrator, Donald A. Crawford.

6. Hearings were held before Arbitrator Crawford on July 22 and 23, 1965. Briefs were submitted on November 5, 1965 with oral argument on November 16, 1965. At the outset of the hearing, counsel for the Union contended that the arbitrator was to decide all disputes relative to the Buckwalter award. Counsel for Porter sought to restrict the arbitrator's jurisdiction to matters of eligibility [colloquy set forth at length in transcript before Arbitrator Crawford, Appendix K, *infra*]. In its brief filed with the arbitrator on November 5, 1965, Porter stated in part:

> The Company submits here for decision by the Arbitrator the question of which persons are eligible within Part 1 of the Buckwalter award. The Company objects to the arbitrability of these grievances insofar as they go beyond problems of eligibility. There is no waiver on the part of the Company of any right to have such question of arbitrability resolved by the court. (Appellee Appendix 11b-12b, Court of Appeals Record, item 3).

7. On April 15, 1967, Arbitrator Crawford issued the following award:

> 1. Grievants who at time of termination had completed 25 years of continuous service are not required to wait to age 65 for pension payments

under the Buckwalter Award. The Company shall pay them full pensions effective as of the time of their termination.

2. In accordance with the Buckwalter Award, the pension allowance specified in Paragraph 1 and subsequent paragraphs of this Award shall be calculated under Section XX-D of the September 16, 1957 contract, as extended September 15, 1958, without actuarial reduction. The Union request for the application of the minimum guaranteed pension for the grievants is denied.

3. The Company shall pay the grievants the total of the past due pension payments as a lump sum, calculated with the addition of four percent interest, retroactively to the date of their termination.

4. Grievants who at time of termination had completed 25 years of continuous service but have since died before reaching age 65 were eligible under the Buckwalter Award for pension payments at time of termination. The Company shall pay their estates the sum of the full monthly pension payments from time of their termination to their death.

5. Grievants who at the time of termination had completed 24 years of continuous service are eligible under the Buckwalter Award to receive full pension payments upon the completion of their 25th year of continuous service. The Company shall pay them full pensions effective as of the completion of their 25th year of continuous service.

6. George Holmes and Henry Shuttleworth were terminated employees rather than quits and are therefore eligible under Paragraph 1 of the Buck-

walter Award. The Company shall pay them full pensions effective as of time of termination.

7. The grievants who are eligible for pensions under the Buckwalter Award also qualify for a $1,000 non-contributory life insurance policy as of the first of the month following their becoming eligible for pension payments and for the duration of their pensioned retirement. The Company shall pay the estates of deceased grievants the benefits due under the life insurance policy.

8. Howard Norcross and John Affatato were voluntary quits rather than terminated employees. They are therefore not eligible for pensions under Paragraph 1 of the Buckwalter Award.

9. The Union request for funding and joint administration of the pension plan is denied. (Appendix G, *infra*, pp. 112a-113a).

8. The District Court on April 4, 1968, pursuant to Porter's motion, vacated substantial portions of the award as follows:

Paragraph 1 of the Crawford Award is vacated in its entirety. The arbitrator exceeded his authority in ruling on 'time of payment.' This dispute was only adjustable by the parties or, of course, by this Court under its Order and Judgment. As such, I hold that grievants who at the time of termination had completed 25 years of continuous service are required to wait until age 65 for pension payments.

Paragraph 2 is upheld only insofar as it denies the Union request for the application of the minimum guaranteed pension for the grievants. Calculation of the benefits "without actuarial reduc-

tion" pertains to "method of payment" and as such was not a proper subject for arbitration.

Paragraph 3, likewise, goes to method of payment and is thus vacated as it is outside the scope of arbitration.

Paragraph 4 must be vacated in its entirety. Again, the Arbitrator exceeded his authority in ruling on time for payment. Since, I have ruled that payments should commence at the age of 65 and since section 20.50 of the collective bargaining agreement provides that pension payments 'shall cease at the death of the employee,' an employee dying before his 65th birthday would forfeit his pension rights; nor would the estate of the decedent qualify for any of the payments.

Paragraph 5 is vacated in its entirety. While, the granting of pension benefits to grievants with only 24 years of service certainly goes to eligibility, it flies in the face of the Court of Appeals ruling that the 25 years of service requirement could not be dispensed with. The Buckwalter Award as enforced by this Court specifically requires 25 years of service.

Paragraph 6 is vacated insofar as it directs that Holmes and Shuttleworth should be paid full pensions prior to the time that each attains sixty-five years of age. In no case should any payments be made to any grievant prior to the time he reaches the age of 65.

Paragraph 7 will be enforced insofar as it pertains to eligibility. Thus, each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not

> yet reached age sixty-five qualifies for a $1,000 non-contributory life insurance policy as of the first of the month following his becoming eligible for pension payments, i.e. at the time he reaches the age of 65. Obviously, since a grievant doesn't qualify for the life insurance until he reaches his sixty-fifth birthday, if he dies before such date he cannot receive such a policy. Thus, that part of paragraph 7 pertaining to the payment of benefits under said policies to the estates of grievants who died prior to attaining sixty-five years of age is vacated.
>
> Paragraph 8 will be enforced as it pertains solely to eligibility.
>
> Paragraph 9 will be enforced. (Appendix H, *infra*, pp. 119a-121a).

The District Court found with that requisite positive assurance that Section XX precisely limited pension grievance arbitration to eligibility and that the time and method of payment of pension benefits was not an arbitrable problem of eligibility. Further, the court specifically found that Porter's participation in the Crawford arbitration proceeding was not an agreement to subject the formula for payment or the time and method of payment to arbitration. In the absence of an agreement to arbitrate, this dispute of course was for the Court to decide, with or without the earlier Order of December 7.

9. The Union's appeal followed. On January 10, 1969, the Court of Appeals reversed the District Court with directions to enter judgment enforcing the Crawford award. With regard to whether or not such award involved matters beyond eligibility, the court said:

> Section XX-B must be construed in the context of the unanticipated supervening act of the company in closing the plant which made it impossible for some of the employees to continue in service until attaining the age of sixty-five. As the agreement had been written, in the normal course of events an employee who had served for twenty-five years but had not yet reached the age of sixty-five could continue in his employment until both conditions were fulfilled, and would thereupon be 'eligible for pension.' Such eligibility automatically carried with it the right to immediate pension payments and there was no distinction in time between eligibility for pension and payment of pension benefits. Buckwalter, in awarding full pensions to employees who had served for twenty-five years but had not attained age sixty-five, held that they became eligible because the removal of the plant made impossible their continued service until they reached age sixty-five. Since the premature termination of their employment displaced the requirement that the employees must reach age sixty-five, the standard of eligibility was now altered and with it the time of accrual of the right to payment. The two questions, when an employee was entitled to pension and when the right to payment of pension benefits accrued, are at least so interwoven in the circumstances of this case that we cannot say that § XX-B alone requires their elimination from the scope of arbitration.' (Appendix I, *infra*, pp. 130a-131a).

The Court of Appeals did not find that the Crawford award drew its essence from the collective bargaining agreement or the common law of the shop; rather, the court looked solely for support to extra-contractual conduct of the parties:

If the authority for Crawford's decision may not be found in the collective bargaining agreement, it was clearly authorized by the definition of the scope of their dispute in paragraph 4 of the judgment which the parties transmuted into an arbitration. Such an agreement is, of course, valid and enforceable. Cf. Anaconda Co. v. Smeltermen's Union, — F. 2d — (9 Cir. 1968).

* * *

If the company is now required to submit to an award which goes beyond the literal meaning of § XX-B, it is because the closing of the plant was an unanticipated event for which the agreement made no provision. The issues which followed from this and the dispute regarding the Buckwalter award were submitted to Crawford without limitation. Where the parties bring to an arbitrator the full range of their dispute and express no reservation in their submission, the broad doctrine which favors the arbitration of labor disputes must be given full scope. (Appendix I, *infra,* pp. 132a-133a).

Porter's petition for rehearing was denied on February 20, 1969, with Judge Van Dusen dissenting. (Court of Appeals Record, item 10).

REASONS FOR GRANTING THE WRIT.

The writ should be granted because the Court of Appeals has reached an erroneous decision that is antagonistic to a significant aspect of the national labor policy. The decision below imposes an unwarranted impediment on the orderly administration of the labor arbitration process.

An understanding of what the Court of Appeals did and failed to do is imperative for recognition of the magnitude of the error committed.

First, the Court of Appeals held that time of payment and eligibility "are at least so interwoven in the circumstances of this case that we cannot say that § XX-B alone requires their elimination from the scope of arbitration." (Appendix I, *infra,* pp. 130a-131a).

Second, the Court of Appeals held that even if § XX-B excludes time and method of payment from arbitration, Porter voluntarily brought the dispute "within the realm of arbitration by agreeing to submit the dispute to Crawford." (Appendix I, *infra,* p. 131a).

Third, having thus resolved the question of arbitrability, the Court of Appeals refused to determine whether the award was authorized by the collective bargaining agreement. The court looked to neither that agreement nor any prior practice. Instead, it held that where the contract does not literally provide for a given situation which the parties take to arbitration, the federal labor policy requires enforcing any award whatsoever:

> If the company is now required to submit to an award which goes beyond the literal meaning of § XX-B, it is because the closing of the plant was an unanticipated event for which the agreement made no provision. The issues which followed from this and the dispute regarding the Buckwalter award were submitted to Crawford without limitation. Where the parties bring

> to an arbitrator the full range of their dispute and express no reservation in their submission, the broad doctrine which favors the arbitration of labor disputes must be given full scope. (Appendix I, *infra,* p. 133a).

Each of the elements of this decision was erroneous. Each such error impels the granting of the writ.

1. While doubts as to arbitrability are to be resolved in favor of coverage,[2] it is undoubted that:

> Under our decisions, whether the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. *Atkinson v. Sinclair Refining Co.,* 370 U. S. 238, 241 (1962).

Porter's contract expressly provided that "the only pension problems subject to arbitration" should be problems of "eligibility."

It is undeniable that every pension problem presents the threshold question: is the employee for whom pension is sought eligible for pension. That question, and only that question, was agreed to be "subject to arbitration." All subsequent questions, such as amount, time of payment, method of payment, funding and joint administration, were thereby expressly excluded from arbitration. Porter reserved such questions as to its legal obligation for judicial determination. To refuse that judicial determination because eligibility is "interwoven" with accrual of the right to payment renders meaningless the contract exclusion, and makes a mockery of the promise in *Sinclair.*

2. The alternative basis on which the Court of Appeals determined all issues to be arbitrable is more serious error. Here the Court held that since Porter agreed to

---

2. *United Steelworkers of America v. Warrior & Gulf N. Co.,* 363 U. S. 574, 583 (1960):

the form of judgment of December 7, 1964, and made no "express limitation" before proceeding with arbitration, Porter must be presumed to have included all disputes within the scope of the submission (Appendix I, *infra,* p. 131a).

Proof of such an agreement cannot be furthered by reference to the fact that the form of the Order and Judgment of December 7, 1964 was approved by the parties. Regardless of its author, it was the District Court's Order and Judgment, which it described as follows:

> The Order and Judgment of December 7, 1964 in no way enlarges the scope of authority given to an arbitrator by XX-B of the collective bargaining agreement. Under this Order and Judgment, this Court is the proper forum in which to decide disputes as to time and method of payment (Appendix H, *infra,* p. 119a).

Moreover, any reasonable requirement of "express limitation" was amply met. The Court of Appeals' statement of the facts recites that there was no prior agreement to submit all disputes to arbitration, and that at its first opportunity, "During the course of the hearings the company . . . objected to the decision of any problems beyond eligibility." (Appendix I, *infra,* p. 127a). In fact, as the first ten pages of the transcript of that hearing reveal,[3] five times it was suggested by counsel for the union and the arbitrator that all disputes were submitted for decision without limitation by the collective bargaining agreement. Each of those five times counsel for Porter rejected that suggestion and invoked the contractual limitation on arbitration. This was not to be a "resort to arbitration unrestricted at the outset."

3. Printed as Exhibit J, *infra.*

Rule 52 of the Federal Rules of Civil Procedure directs that:

> Findings of fact shall not be set aside unless clearly erroneous . . . . .

Judge Lord specifically found:

> While the parties could have agreed voluntarily to subject formula for payment to arbitration as well as eligibility, there has been no showing that this was done. Porter's submission to the arbitration did not constitute such an agreement (Appendix H, *infra,* p. 119a).

This Court has heretofore held that the "clearly erroneous" rule applies to factual inferences from undisputed facts, as well as to findings from conflicting testimony. *Commissioner v. Duberstein,* 363 U. S. 278, 291 (1960). A finding based on supporting evidence can be reversed only when the reviewing court "is left with the definite and firm conviction that a mistake has been made." *United States v. Gypsum Co.,* 333 U. S. 364, 395; *rehearing denied,* 333 U. S. 869 (1948). The Court of Appeals' own statement of the facts was that there was no "express statement" of agreement when the arbitrator was selected, and that at the hearing Porter "objected to the decision of any problems beyond eligibility." If the "presumption" then is merely an evidentiary device, even with that presumption the Courts' own statement of the facts belies the requisite "definite and firm conviction."

3. The critical error committed below is the Court of Appeals' refusal to determine whether the award rendered actually did draw its essence from the collective bargaining agreement. It concluded that since Porter participated in arbitration as to an event "for which the agreement made

no provision," the "full scope" of the doctrine favoring arbitration requires Porter "to submit to an award which goes beyond the literal meaning of § XX-B . . . ." (Appendix I, *infra*, p. 133a).

This decision does not not comport with prior statements of this Court, and conflicts with the national labor policy of fostering the resolution of disputes through voluntary recourse to arbitration. Section 203(d) Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173(d); *United Steelworkers of America v. Warrior & Gulf N. Co.*, 363 U. S. 574, 578 (1960); *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1957).

In *Lincoln Mills* the Federal courts were charged with fashioning a remedy that would effectuate that policy. The instant decision impedes rather than promotes such policy.

Where there is agreement to arbitrate, the courts will order the arbitration of a grievance "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Warrior & Gulf*, 363 U. S. *supra* at 582-583. Arbitration will be ordered if "the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley & Sons, Inc. v. Livngston*, 376 U. S. 543, 555 (1964). This policy is adopted because the "processing of even frivolous claims may have therapeutic values." *United Steelworkers of America v. American Mfg. Co.*, 363 U. S. 564, 568 (1960).

Subsequent to the District Court's Order and Judgment of December 7, 1964, the parties were faced with a variety of unresolved disputes (set forth *supra* at pp. 10-11). Several of these specifically involved problems of eligibility and were arbitrable; some were arguably arbitrable; and some were wholly unrelated to eligibility.

National labor policy would not suggest that Porter, faced with these mixed disputes, should resort to the courts at this stage for separation of the arbitrable from the non-arbitrable. The Third Circuit itself has discouraged such a "resort to interstitial judicial activity . . . when the possibility exists that a labor dispute can be settled without any use of the courts whatsoever." *Local 719, American Bakery & Confectionery Workers of America v. National Biscuit Company,* 378 F. 2d 918, 921-922 (3rd Cir. 1967).

The decision below, if allowed to stand, encourages a party against whom two or more claims are made, even if one is recognized as arbitrable, to shun the course adopted by Porter. The alternatives do not further an efficient use of the courts or a sound development of the policy favoring arbitration. One in Porter's position will refuse to arbitrate either dispute, requiring a judicial determination of the scope of his duty to arbitrate as to both. Or he will proceed to arbitrate the dispute recognized as arbitrable, and abstain from participation or desert the proceedings when his adversary raises matters of contested arbitrability. Or he will insist on two separate proceedings, one for disputes of admitted arbitrability, and the other, even if factually related, for disputes of contested arbitrability.

These alternatives of course present possible ways of dealing with the problem posed by this case. But a decision encouraging these alternatives does not reflect the "judicial inventiveness" called for in *Lincoln Mills* and exhibited by the Third Circuit when presented with a similar problem in the *National Biscuit Company* case.

The Court of Appeals' distinction of *National Biscuit Company,* based as it is on the clarity of the objection to arbitrability, is a meaningless one in the context of the policy promoting resort to voluntary arbitration. *United*

Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U. S. 574, 581 (1960), teaches that:

> The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

To require that process to be hedged with technical statements of legal position cannot promote, but can impede, the progress of that vehicle.

The penalty imposed upon Porter, denial of its right to judicial review, is a deterrent to the intended working of the arbitration process. Such review, although admittedly limited, is necessary and promised:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *Steelworkers v. Enterprise Corp.*, 363 U. S. 593, 597 (1959).

4. Such a limited review of the arbitrator's award, had it been undertaken in the instant case, would have led to the conclusion that the award was unenforceable.

In the collective bargaining agreement, Porter promised a "Basic yearly pension allowance" to each retired employee "who has reached the age of sixty-five." The arbitrator ruled that, given the hardship of termination, the grievants "are not required to wait to age 65 for pension payments. . . ." This contrary result cannot be justified.

The District Court's holding to this effect was clear and concise:

> This dispute ['time of payment'] was only adjustable by the parties or, of course, by this Court under its Order and Judgment. As such, I hold that grievants who at the time of termination had completed 25 years of continuous service are required to wait until age 65 for pension payments. (Appendix H, *infra,* p. 119a).

The Court of Appeals, in reversing, never attempted to determine whether the award rendered actually did draw its essence from the collective bargaining agreement. It relied solely on a presumed subsequent agreement to have the arbitrator decide all disputes. The only hint of its thinking is found in its discussion of arbitrability, where it states:

> Since the premature termination of their employment displaced the requirement that the employees must reach age sixty-five, the standard of eligibility was now altered and with it the time of accrual of the right to payment. (Appendix I, *infra,* p. 130a).

The Court thus suggests a frustration or impossibility theory as justification for the award. But while termination may have dispensed with the requirement that the *employment* continue up to age sixty-five, it has absolutely no relation to dispensing with the requirement that the employee's *age* reach sixty-five before pension payments start. The elimination of this contractual requirement results in a substantial change in the economic bargain for pensions to which both Porter and the Union had agreed. No theory of impossibility of contractual performance carries with it the imposition of an economic penalty. This, however, is the effect of this award against Porter who had bargained only for the prospective pension payments to certain employees from age sixty-five.

Only a clearly-documented practice could justify the imposition of this substantial incremental burden. No such practice was even discussed by the Court of Appeals. In fact no such practice existed.[4]

Even the limited review of the merits promised in *Enterprise,* therefore, if ever given, will result in reversal of the Court of Appeals and vacating the arbitrator's award.

The result of this case is that a financial burden is imposed on petitioner utterly disproportionate to the obligation for which it contracted, through the enforcement of an arbitrator's award without support in the collective bargaining agreement or practices thereunder. The attempt to justify this result in terms of a simple question of fact contravenes the direction of Rule 52 as previously construed by this Court. The attempt to justify this result in terms of furthering the federal labor policy in fact disserves the policy of the national labor laws and the remedies fashioned by prior decisions of this Court. These errors can be corrected only if Porter's petition is granted.

---

4. The record before the arbitrator establishes only one unexplained instance of payment to an employee before retirement age. Cf. Appendix G, *infra,* p. 94a. One unexplained instance, not subsequently repeated, over several years' time in a work force numbering in the thousands can not be construed as a prior "practice."

CONCLUSION.

WHEREFORE, Porter requests that its Petition for Certiorari be granted, and the entire decision be reviewed by this Court. In the alternative, Porter requests that Certiorari be granted for the limited purpose of reviewing that part of the decision precluding Porter from questioning the authority of the arbitrator because of Porter's participation in arbitration.

Respectfully submitted,

PHILIP H. STRUBING,
Attorney for Petitioner,
H. K. Porter Company, Inc.

PEPPER, HAMILTON & SCHEETZ,
PAUL R. OBERT,
Of Counsel.

LIBRARY
SUPREME COURT, U. S.

FILED
MAY 21 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 1419

H. K. PORTER COMPANY, INC.,
Petitioner,

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION NO. 22254, AFL-CIO,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PHILIP H. STRUBING,
2001 Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorney for Petitioner,
H. K. Porter Company,
Inc.

PEPPER, HAMILTON & SHEETZ,
2001 Fidelity Building,
Philadelphia, Pennsylvania. 19109

PAUL R. OBERT,
1500 Porter Building,
Pittsburgh, Pennsylvania. 15219
Of Counsel.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215.

INDEX.

	Page
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	12a
APPENDIX D	46a
APPENDIX E	55a
APPENDIX F	69a
APPENDIX G	71a
APPENDIX H	114a
APPENDIX I	123a
APPENDIX J	135a
APPENDIX K	141a

APPENDIX A

Opinion of the United States District Court for the Eastern District of Pennsylvania, 190 F. Supp. 407 (E.D. Pa. 1960).

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION NO. 22254, AFL-CIO by Joseph Adair, President and Trustee ad litem

v.

H. K. PORTER COMPANY, DISSTON DIVISION

Civ. A. No. 27077.

United States District Court E. D. Pennsylvania.

Aug. 4, 1960.

Richard H. Markowitz, Wilderman & Markowitz, Philadelphia, Pa. for plaintiff.

Miles W. Kirkpatrick, Philadelphia, Pa., Blaine E. Capehart, Camden, N. J., for defendant.

LORD, District Judge.

Plaintiff Union seeks to compel the defendant Company to proceed to arbitration under a collective bargaining agreement. The plaintiff *Union* is the United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO, an unincorporated association located in Philadelphia, Pennsylvania, by Joseph Adair, President and trustee ad litem. The defendant *Company* is H. K. Porter Company, Disston Division, a corporation organized and chartered under the laws of the state of Delaware, hav-

ing an office and doing business at its Tacony plant in Philadelphia.

This motion for summary judgment is of course addressed to the pleadings only, i. e. the complaint and answer. This motion, accordingly, in no way involves the merits—and there is before the Court the bare question of whether the Union is entitled to the reference to arbitration as a matter of law.

Plaintiff asks the Court to order defendant to submit two sets or groups of disputes (which plaintiff—despite defendant's vigorous denials—insists are grievances) to arbitration procedure.

Defendant says that summary judgment is inappropriate, since there are genuine issues as to material facts. Plaintiff says that such submission to arbitration will be entirely in accord with the grievance procedure outlined in Sections III and IV of the collective bargaining agreement in existence between these parties. Defendant argues that these disputes are not arbitrable under the contract. Furthermore, defendant says that arbitrability is a matter for the Court; and that the Court will need detailed consideration of the contractual limitations upon arbitration. Thus the question is not one to be decided summarily, it says.

Certain matters and circumstances appear uncontradicted from the pleadings, and form a basis for the Court's consideration of this motion.

(1) Jurisdiction is conferred on this Court by § 301, Labor Management Relations Act of 1947, 29 U.S.C.A. § 185.

(2) Plaintiff Union is the collective bargaining representative of all employees of the defendant at its Disston Division, Tacony plant, Philadelphia 35, Pennsylvania, except certain classes of employees specifically excluded by the parties' collective bargaining agreement and not here involved.

(3) The defendant Company is engaged in an industry affecting commerce within the meaning of § 2(7) of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C.A. § 151 et seq.

(4) The plaintiff and defendant are parties to a collective bargaining Agreement dated September 15, 1957 and extended by a Supplemental Agreement dated September 15, 1958.

(5) In February of 1959, the defendant announced that it intended to move a large part of its production facilities from its Tacony plant to a plant in Danville, Virginia.

(6) Subsequent to the Company's announcement of its intent to move its plant, the Union and the Company had discussions of severance pay for employees affected and the pension rights of employees who would be laid off as a result of the move. No agreement was reached on these subjects.

At about this juncture, the pleaders part company. The Union, as indicated, characterizes the subject of the discussions as grievances, and the discussions as "grievance meetings"—characterizations which are vigorously disclaimed by the Company.

Technically, it is true that since the present motion is directed solely to the pleadings, the Union admits the truth of the Company's well-pleaded allegations in its Answer. See 6 Moore's Fed. Pract. 2058, 2064 (2d ed. 1953). As will be made more apparent later, however, the present case is not deemed to be one for technical treatment. The chief differences between the parties, in any event, seem to be as to the legal effect of the subsequent transactions.

On July 30, 1959 the Union wrote the Company asking that the grievances relating to the described subjects be re-

ferred to the impartial chairman designated in §§ III and IV of the collective bargaining agreement. Disclaiming the designation of "grievances" the Company admits receiving the letter but says, however, that the Union letter

> "* * * does not suggest any relationship between the issue of severance pay and the collective bargaining agreement. It speaks of the failure of the parties to reach some understanding regarding what the Company was going to do to assist the employees affected by the Danville Move. The Union, in its July 30, 1959 letter, also speaks with complete vagueness about a difference between the Company and the Union with respect to Section XX of the Agreement (Pensions) as it related to employees affected by the Company's move to Danville * * *"

On August 10, 1959, the Company replied to the Union's July 30, 1959 letter stating in essence that the matters referred to therein were not arbitrable.

Ten days later, 127 individual members of the Union—by letters of August 20, 1959—wrote

> "complaining of the Company's misinterpretation, misapplication and violation of § XX of the collective bargaining Agreement, relating to Pensions and to the Company's refusal to grant or to discuss the counter proposal submitted by the plaintiff to the company on an assistance plan for employees affected by the Company's move to Danville, Virginia."

Defendant concedes that it received these August 20 communications, but denies that they constituted grievances and, of course, does not admit the plaintiff's assertions as to the merits of the employees' complaints.

The defendant takes the narrative one step beyond the plaintiff's version. It is defendant's assertion that the

Union thereafter withdrew its demand for severance pay. Defendant says:

> "On August 24, 1959 the parties began negotiations on a new collective bargaining Agreement. At that time plaintiff presented to defendant a written proposal which contained demands for (1) a severance pay plan and (2) improved pension benefits * * * After many negotiation sessions between the parties a new contract was agreed upon on September 15, 1959, in which the Company agreed to a change in pension benefits and the Union withdrew its severance pay demand * * * "

It will serve no purpose here to go beyond the bare recital of the defendant's foregoing version of those subsequent negotiations. Comment on the legal effect of such occurrences will be reserved for a later part of this opinion.

The plaintiff's position is that the foregoing sequence of events, according to its interpretation, amounts to a violation of the collective bargaining agreement by force of defendant's refusal to process and arbitrate the described grievances. Accordingly, plaintiff asks this Court to order defendant to abide by its agreement and, accordingly, accept and process through arbitration these matters which the plaintiff has described as grievances.

Defendant's position, as the foregoing suggests, is simply that severance pay, and the pension rights, of employees laid off as a result of the plant move to Virginia are simply matters not comprehended by the grievance and arbitration provisions of the contract. They point out, for instance, that in § IV B that Agreement states that "neither the Company nor the Union agree to submit to arbitration broad labor policies." These matters, defendant says, concern broad labor policies.

Another section which defendant urges as controlling in its favor is § XX B of the agreement providing that "the

only pension problems subject to arbitration'' are ones involving ''eligibility within the terms'' of the Pension Plan set forth in the collective bargaining agreement.

Analysis of the legal effect of the foregoing facts and contentions will be made in the order of defendant's principal grounds of opposition to the motion.

I. Are there Genuine Issues as to Material Facts?

If there exist genuine issues as to material facts, the motion for summary judgment cannot, of course, be granted. It presently appears, however, that there is no real disagreement as to the transactions between the parties, but only as to the legal effect of those dealings.

A possible exception is the defendant's contention that

> '' * * * After many negotiation sessions between the parties a new contract was agreed upon on September 15, 1959 in which the Company agreed to a change in pension benefits and the Union withdrew its severance pay demand * * * ''

The essence of that quoted statement appears as par. 13 of Defendant's Fifth Defense and may be taken technically as admitted by plaintiff's motion. As a matter of law, however, the Court determines that the pleaded withdrawal of severance pay demand would not work an estoppel as to plaintiff's alleged grievances involving severance pay on the authority of United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; see Whittaker J., dissenting 80 S.Ct. 1354, 1356. In that case, arbitration was directed by the Court even though, as the dissenting opinion cited shows, there had been unsuccessful subsequent efforts to negotiate the very concession involved in the grievance.

II. The Contention that Arbitrability is for the Court to Determine and in Making its Determination the Court Must of Necessity Consider the Contract.

Defendant's essential point, of course, is that proper consideration of the contract and so much of its background as will make possible its proper construction is no matter for summary judgment. The recommended analysis-in-depth, so to speak, is a matter more readily to be discussed in the third branch of this discussion rather than at present. On the general topic, however, both sides have quoted in their briefs from the opinion of this Court in Cuneo Eastern Press, Inc. of Pa. v. Bookbinders and Bindery Women's Union, Local No. 2, D.C.E.D.Pa. 1959, 176 F.Supp. 956. The quoted passages are generalizations, culled from collected authorities, to the effect that the Court must determine arbitrability in the first instance, and that arbitration is favored in labor disputes. The Court affirms that decision.

III. Are these Grievances Arbitrable?

Defendant's final point, that the grievances are not arbitrable under the contract, brings one to the crux and essence of this matter.

Three cases decided during the pendency of this motion were recognized by counsel as being likely to determine this motion, as shown by the fact that both sides immediately sought and received leave to file supplemental briefs on the three decisions handed down June 20, 1960: United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; United Steelworkers of America v. Enterprise W. & Co. Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. The Warrior case is the only one deemed to have direct bearing on the present motion, but some sense

of the impact of these cases may be conveyed by the following comment in Law Week for July 12, 1960:

> "Three years ago, in Textile Workers [of America] v. Lincoln Mills, 353 U.S. 448 [77 S.Ct. 912, 1 L.Ed.2d 972] 25 LW 4287, the Supreme Court declared that the federal courts should formulate the law to be applied in enforcing arbitration clauses in collective bargaining agreements. This year, the Court took long steps forward in the implementation of this doctrine. In a series of three opinions, the Court made it clear that the judiciary was to play a very minor role in the arbitral process; the major role is to be played by the arbitrators selected by the parties."

The Warrior case bears quite squarely on the present point, and permits no option other than granting plaintiff's motion. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409.

The Warrior company maintains a terminal at Chicasaw, Alabama, where it performs maintenance and repair work on its barges. The employees at that terminal constituted a bargaining unit, represented by the petitioning United Steelworkers, and were covered by a collective bargaining contract negotiated by the petitioner union. Between 1956 and 1958 the terminal laid off about half of the employees of the bargaining unit. That reduction was due in part to Warrior's contracting-out certain maintenance work, formerly done by its own employees, to other companies.

On behalf of a group of terminal employees the petitioner presented a grievance protesting the Company's actions in contracting-out that work, alleged to have the effect of a partial lockout. The opinion continues:

> "The collective agreement had both a 'no strike' and a 'no lockout' provision. It also had a grievance procedure which provided in relevant part as follows
>
> "* * * matters which are strictly a function of management shall not be subject to arbitration under this section."

The further provisions of the collective bargaining agreement, providing for references to arbitration if the matter cannot be settled at lower echelons, are prefaced by the following language:

> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise. * * * "

When the grievance was not settled, and Warrior refused arbitration, this suit was commenced by the union to compel it.

The District Court granted respondent's motion to dismiss the complaint, 168 F.Supp. 702, 705, on the principal ground that

> "the contracting out of repair and maintenance work * * * is strictly a function of management not limited in any respect by the labor agreement involved here."

The Court of Appeals for the Fifth Circuit affirmed, the majority agreeing that the matter was an excluded "function of management." 269 F.2d 633, 635.

The opinion of the Court by Mr. Justice Douglas commences by restating the principles of the Lincoln Mills case approving federal enforcement of the provision for arbitration of grievances in a collective bargaining agreement.

Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972.

The language of Mr. Justice Douglas makes clear that all doubts are to be resolved in favor of arbitrability. Arbitration would be compelled unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute.

The mandate of this decision of the United States Supreme Court seems clear as applied to the present case. The contract involved in Warrior specified as not arbitrable matters "strictly a function of management". In the instant case "broad labor policies" are likewise excluded. If contracting work to outside plants was not a function of management, it seems evident that the present disputes are not exempt from arbitration as "broad labor policies."

The provisions of the respective contracts as to that which is arbitrable in Warrior and the Disston collective bargaining agreement are virtually identical.

In the instant case, the arbitration clause is quite broad, and the quoted clause and another reference to non-arbitrable matters are both quite vague. The Warrior opinion is replete with language which requires arbitration in such case, of which the following passage is an example:

> "* * * In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad * * *" Ibid., 80 S.Ct. 1354.

For the foregoing reasons, it is the ruling of this Court that the plaintiff is entitled to Judgment on its motion for summary judgment and an appropriate order may be submitted.

APPENDIX B

Order of the United States District Court for the Eastern District of Pennsylvania

ORDER.

AND Now, to wit, this 11th day of April, 1961, it is hereby ordered and decreed that the plaintiff's Motion for Summary Judgment in the above matter be, and the same is hereby Granted, and that Summary Judgment is hereby entered in favor of plaintiff, United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO, and that defendant is hereby ORDERED to "conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the plaintiff, to select an Impartial Chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof. Each party to bear its own costs on this appeal.

By THE COURT,

/s/ LORD, *J.*

APPENDIX C

Award of Arbitrator W. Roy Buckwalter

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated September 15, 1957, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

Pensions: The Arbitrator rules that:

1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

The formula for payment to be worked out by H. K. Porter Company and the Union.

Each terminated employe shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

3. The request for pensions for employees who, at their termination, had not yet reached age sixty-five and who had not put in twenty-five years of service is denied.

Severance Pay:

The Union's request for severance pay is denied.

W. ROY BUCKWALTER
W. Roy Buckwalter,
Impartial Chairman.

DATED: August 17, 1962

CASE NO. L-31115-Phi-L-346-61

OPINION OF ARBITRATOR.

Grievance.

"The issues to be arbitrated relate to pensions and severance pay, as required by the Order of the United States District Court for the Eastern District of Pennsylvania, a conformed copy of which is attached hereto.

The Union grieves that the Company has misinterpreted and misapplied Article XX of the Agreement insofar as the eligibility for pensions of employees affected by the Company's movement of its plant to Danville, Virginia, is concerned. In addition, the Union grieves that the Company's proposal entitled "Employee Assistance Plan for Employees Affected by the Danville Move is unacceptable and the Company has refused to discuss counter-proposals submitted by the Union, or to take any action thereon in the making of adequate provision for employees affected by the Company's move to Danville, Virginia."

Background.

For many years Henry Disston & Sons, Inc., a Pennsylvania corporation, operated a plant in Philadelphia. It was engaged in the production of armor plate, steel, and small tools.

In November, 1955, the H. K. Porter Company, in exchange for stock, acquired substantially all assets, subject to liabilities, of Henry Disston & Sons, Inc.

In February, 1959, a meeting was held between Company and Union representatives. Mr. J. C. Hydrick, Vice President and General Manager, announced the Company's intention of moving part of the Philadelphia operations to Danville, Virginia (N. T. 160). Hydrick stated that no to move to Danville (N. T. 162). In reply the question hourly workers in the Philadelphia plant would be invited

whether hourly workers from Philadelphia would be hired at Danville the answer was "yes" (N. T. 162). The Union asked what rate would be paid to Philadelphia employees who went to Danville and were hired. The answer was that such workers would be paid the going rate for the Danville area (N. T. 162).

The move to Danville was scheduled to begin between August 15 and September 1, 1959, and was to be completed within 60 to 90 days (N. T. 166, and Union Exhibit No. 11).

It was estimated that as a result of the Danville move at least 350 employees at the Philadelphia plant would lose their jobs (N. T. 297 and Joint Exhibit No. 14).

On July 2, 1959, the Union was given a one page statement, signed by J. C. Hydrick. This statement was entitled "Employee Assistance Plan for Employees Affected by the Danville Move" (Joint Exhibit No. 15). This plan provided the following payments "to maintenance and service workers who are affected by the Danville move and who will be laid off between August 1, 1959, and March 1, 1960 and who cannot be relocated at the Tacony plant by April 1, 1960 or pensioned within one calendar year from layoff date" (Joint Exhibit No. 15):

1 week's pay to employees with over 1 but less than 10 years of service as of lay off date.

2 weeks' pay to employees with over 10 but less than 20 years of service as of lay off date.

3 weeks' pay to employees with over 20 but less than 30 years of service as of lay off date.

4 weeks' pay to employees with over 30 but less than 40 years of service as of lay off date.

5 weeks' pay to employees with over 40 but less than 50 years of service as of lay off date.

Under date of July 17, 1959, Mr. Joseph Adair, Union President, informed Mr. Walter Norton, Industrial Relations Manager, that the Company's proposal (Joint Exhibit No. 15) had been considered by the Union Plant Committee and that the Committee felt that the proposal was "unacceptable in its submitted form and content" (Joint Exhibit No. 17a).

Attached to the above cited Union letter of July 17, 1959, was the Union's "counter-proposal relating to Employees Affected by the Danville Move." This proposal entitled, "Union's Proposal Relating to the Employees Affected by the Danville Move" (Joint Exhibit No. 17b) provided:

1. All employees with up to 5 years service shall receive 1 week severance pay.

2. All employees with over 5 years and up to 10 years service shall receive 2 weeks' severance pay.

3. All employees with over 10 years and up to 15 years service shall receive 6 weeks' severance pay.

4. All employees with over 15 years and up to 20 years service shall receive 10 weeks' severance pay.

5. All employees with over 20 years and less than 25 years service shall receive 15 weeks' severance pay.

6. a. All employees who have 25 years of service or better and whose jobs are being discontinued due to their departments being moved to Danville, shall receive a Pension when they reach age 65 in accordance to the present Pension Plan.

6. b. The Company may, if it so desires, fund this program or buy it through an Insurance Company, or they may put sufficient sums in escrow to meet these payments as they fall due.

6. c. All employees covered by 6-a above shall be given a $1,000 paid up Life Insurance policy in accordance with Section XIX "A" of the present agreement covering Life Insurance. To be given at the time of lay off.

Under date of July 30, 1959, the Union suggested to Management that "To expedite the final resolution of this grievance, the Union suggests that the Company and Union by-pass Steps 1 and 4 inclusive of the Grievance Procedure and that an Impartial Chairman be promptly designated to hear and render a final decision on the described grievance" (Joint Exhibit 20).

Under date of August 10, 1959, Management informed the Union that "After careful consideration, the Company has concluded that the matters which you refer in your letter are not arbitrable under the provisions of the current union contract" (Joint Exhibit 22).

Under date of August 10, 1959, (Joint Exhibit No. 23) the Union filed a grievance signed by 127 union members. The grievance stated, "We believe that the Company's action in terminating our employment without making adequate provision for us constitutes a misinterpretation, misapplication and a violation of Article XX of the Agreement. In addition, we are informed that the Company and the Union have been endeavoring to work out an 'employee Assistance Plan for employees Affected by the Danville Move;' however, the Company has refused to discuss the counter-proposal submitted by the Union. Therefore, since a difference has arisen, we desire to have this grievance likewise handled in accordance with Section III and Section IV of the Agreement."

Under date of August 28, 1959, Management informed the Union that "The Company feels that the Pension clause of our Agreement is so clearly written that the problem you

present cannot be a violation, misinterpretation or misapplication of our Agreement, as your problem is not covered by our existing Pension Plan thru arbitration. Under our Agreement, this cannot be done." "In addition, the Company's 'Employee Assistance Plan for Employees Affected by the Danville Move' is a broad labor policy and problem not covered by our existing Agreement. As heretofore pointed out, this is not a subject of arbitration" (Joint Exhibit No. 26).

The Union then took the issues to United States District Court for the Eastern District of Pennsylvania to compel the Company to proceed to arbitration under a collective bargaining agreement. The Union argued that the Company, by refusing to process and arbitrate the pension and severance grievances, was in violation of the labor agreement. The Company contended that the pension rights, and severance pay, of employees laid off as a result of the move to Danville, Virginia, were matters not comprehended by the grievance and arbitration provisions of the labor agreement.

Under date of September 23, 1960, the following order was issued by the District Court:

"Defendant is hereby ordered to conform & comply with Sections III and IV of the collective bargaining agreement between itself and the plaintiff, to select an impartial chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the following stated grievances.

1. Are the employees who are covered by the Collective Bargaining Agreement and who were severed from employment as a consequence of the removal of a portion of the Company's operations to Danville, Virginia eligible for pensions within the terms of Section XX of the Agreement?

2. Do the provisions of the Collective Bargaining Agreement obligate the Company to provide severance benefits in respect of said severed employees and, if so to whom and in what amounts shall such benefits be paid" (Union Exhibit 1, page 19a)?

The Union appealed from the above cited order. The appeal was not concerned with the merits of the opinion and order of the District Court, but only with the nature and scope of the order (Union Exhibit 1, pages 2-3).

The Appellant (Union) contended that it was not the function of a federal court to limit or define the exact nature of the issues to be presented to an arbitrator under a labor agreement. The order of the District Court would not permit the complete development of the Union's position, nor would it leave to the arbitrator the authority and discretion in arriving at a solution and formulating a remedy which the arbitration procedure under this collective bargaining agreement gives to him (Union Exhibit 1, page 4).

The Appellee (Company) presented the following arguments in support of the order issued by the District Court. First, that the order was based on a firmly established principle that it is the function of the court, rather than that of the arbitrator, to determine arbitrability. Secondly, the District Court acted properly when it stated in its order what it found to be arbitrable. Thirdly, the District Court did not err in directing the submission to arbitration of claimed violations of the Collective Bargaining Agreement but not ordering the submission to Arbitration of other matters involving changes in or additions to the labor agreement (Company Exhibit 1, pages 4-10).

Under date of March 24, 1961, the United State Court of Appeals for the Third Circuit vacated the order of the District Court and directed the lower court to enter the following order:

"And now to wit, this 24th day of March, 1961, it is hereby ordered and decreed that the plaintiff's motion for summary judgment in the matter be, and the same is hereby granted, and that summary judgment is hereby entered in favor of plaintiff, United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO and that defendant is hereby ordered to conform and comply with Sections III and IV of the collective bargaining agreement between itself and the plaintiff, to select an impartial chairman and to submit to arbitration, subject to the provisions of the collective bargaining agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the collective bargaining agreement constitute claimed violations thereof. Each party to bear its own costs on this appeal."

Under date of April 11, 1961, the United States District Court for the Eastern District of Pennsylvania issued the above quoted order.

UNION POSITION.

Arbitrability

Both the District Court and the Circuit Court held that the Union grievance relating to severance pay was arbitrable even though the labor agreement contained no provision for the payment of severance pay. If the Arbitrator were to refuse severance pay on the ground that the labor agreement contains no provision with respect to severance pay he would, in reality, be overruling both the District Court and the Circuit Court (Union Brief, page 3).

With respect to the pension grievance the Company is attempting to have the Arbitrator review the decision of the District Court and the Circuit Court. Both courts held the pension grievance to be arbitrable even though Section XX-C—*Eligibility*—of the labor agreement provided that

"Basic yearly pension allowance (without Social Security) which shall be paid a retired employee who has reached the age of 65 with at least 25 years of continuous service with the Company. . . ." If the Arbitrator were to deny pensions on the grounds that the labor agreement contains the words "age of sixty-five with at least twenty-five years of continuous service with the Company" prevented payment of pensions to others, he would, in effect, be holding that the Union's grievance with respect to pensions was not arbitrable. To so rule would be contrary to the decision of the Courts that this was an arbitrable issue to be heard and decided by an Arbitrator (Union Brief, page 4).

The Union's grievances fall within Section III—*Adjustment of Grievances,* Section A, which provides "Or should any grievance arise between the parties hereto. . . ."

Severance Pay

1. The Union is not asking the Arbitrator to write a severance pay clause to be inserted into the existing labor agreement. It is requesting the Arbitrator to resolve the severance pay grievance which it filed and which has been held by the Courts to be arbitrable. Since the courts have held that severance pay is a grievable issue the task of the Arbitrator is to decide the amount of severance pay (Union Brief, pages 17-18).

2. The District Court held the previous submissions and withdrawals of requests for severance pay by the Union did not constitute an estoppel of the Union's alleged grievances involving severance pay (Union Brief, page 18).

3. The Union did not withdraw its request for severance pay for the terminated employees when the September, 1959 labor agreement was signed. The Union made it very clear to the Company that the severance pay request

was not being abandoned or withdrawn even though the September, 1959 labor agreement did not contain a severance pay provision (Union Brief, page 18).

4. The Company admits that it granted severance pay to fifty-one salaried employees who were terminated by the plant move (Union Brief, page 20).

Fifty-one salaried employees were paid $33,544.76. Approximately four hundred hourly workers were offered approximately $60,000 to be distributed in the manner set forth in Joint Exhibit 15. The Union states that "the inequity and injustice of Porter's offer is clearly obvious" (Union Brief, page 20).

The payment of severance pay to the salaried workers shows that "severance pay is neither new nor abhorent to Porter" (Union Brief, page 21).

5. The Union's request as to severance pay as set forth in Joint Exhibit 17-b, is both equitable and fair (Union Brief, page 24).

6. Porter has presented no real defense to the severance pay grievance. Porter cannot claim that it is unable to pay, therefore it has no financial defense (Union Brief, page 37).

7. Porter has no defense, economic, moral, or social, against a claim for severance pay by employees who have given faithful and able service and who have been summarily cut off by the unilateral action of the Company in moving seventy to eighty per cent of the Departments to Virginia (Union Brief, page 38).

Pensions

1. The Courts have decided that the pension grievance is arbitrable. The task before the Arbitrator is to decide the pension grievance on its merits (Union Brief, page 39).

2. Porter agreed in 1956 to continue the pension plan negotiated between the Union and Henry Disston & Sons, Inc., and not merely to continue to make pension payments (Union Exhibit 2, page 2, Pension) (Union Brief, page 39).

3. The 1950 contract between Disston and the Union (Union Exhibit 3) contained the words "who has reached the age of 65 with at least 25 years of continuous service," and also the words "Problems on eligibility within the terms of this pension plan that cannot be solved by the Pension Committee shall be the only pension problems subject to Arbitration," have continued to be a part of the labor agreement up to and including the applicable 1959 Agreement (Union Brief, page 40).

4. Union exhibits 4aa to 4vv show that over the years, both under Disston and under Porter, employees have received pensions despite the fact that they did not literally and strictly meet the words of Section XX, Pensions, of the labor agreement (Union Brief, page 41).

5. It has, since 1950, been understood that the Pension Board was not the final authority. If problems of eligibility could not be settled the Union had the right to process them through the grievance procedure to arbitration (Union Exhibit 10; Union Brief, page 42). That this procedure has been followed is indicated by the fact that a problem of eligibility was submitted to arbitration in 1950 (Joint Exhibit 28).

6. The Union-Management Pension Committee did not construe breaks in employment caused by the depression as a break in "continuous service with the Company" (N. T. page 258; Union Brief, page 45).

7. The Union-Management Pension Committee and the Pension Board gave weight to the closing down of a depart-

ment in its decision as to whether to grant pensions (Union Exhibits 4r; 4cc; 4dd; 4ee; 4gg; 4pp; Union Brief, page 47).

The purpose and intent of Union Exhibits 4aa to 4vv inclusive are to show that the section relating to pensions has never been interpreted and applied so literally as to cut off employees on the basis of words. On the contrary, the section dealing with Pensions has always been interpreted and applied to allow weight and relevancy to be given to such factors as "the depression," "long years of service" and "department shutdown." For the Arbitrator to give weight and materiality to the factor of the "removal of seventy to eighty per cent of the departments" in resolving the "problem of arbitrability" which is now before him, and to grant pensions, would be proper and just, and in line with what the parties themselves have done, on occasions in the past (Union Brief, pages 47-48).

8. With respect to pensions there are 3 groups:

a. Those terminated employees who have rendered twenty-five years or more of service but had not yet reached age sixty-five at the time of termination (Union Brief, page 52). Pensions as a fringe benefit, are negotiated payments for service, i.e., for years of service. Pensions are not paid because an employee has reached a certain age. For the Company to emphasize "age sixty-five" is to unjustly withhold from an employee his pension which he has earned (Union Brief, pages 56-57). This group is entitled to *full pensions.*

b. Those terminated employees who were sixty-five years of age but had not yet put in twenty-five years of service at the time of termination. Since Porter has made it impossible for these aged employees to continue to work it should not be allowed to profit by its unilateral action in severing these workers.

c. Those employees who had not reached age sixty-five and had not yet put in twenty-five years of service.

The Union holds that an equitable formula on a pro rata basis can and should be worked out for these employees (Union Brief, page 58).

Summary

An equitable pension plan could be worked out on a pro rata basis between the Company and the Union. If the parties failed to reach an agreement then the Arbitrator could prescribe an equitable formula (Union Brief, pages 57-58).

1. Both grievances have been held by the Courts to be arbitrable, therefore, it is not the function of the Arbitrator to determine arbitrability. His task is to decide the grievances on their merits.

2. The Union's full request as to severance pay should be granted.

3. The Union's position with respect to the treatment of the three groups on the matter of pensions is set forth above.

4. The Arbitrator's opinion and award in this case are of tremendous importance.

Among the measures that can be used to mitigate the effects of automation, movement of plants and changes in production methods, are the granting of severance pay and an expanded approach to pension plans (Union Brief, pages 60-61).

In rendering his opinion and award the Arbitrator should give weight to industrial common law and apply it by taking into consideration the economic suffering occasioned by the plant removal to another location.

COMPANY POSITION.

Arbitrability

1. The order of the U. S. District Court as revised by the mandate of the Court of Appeals for the Third Circuit is significant because it directed arbitration:

a. subject to the provisions of the Collective Bargaining Agreement

b. of the grievances with respect to pensions and severance pay

c. insofar as such grievances arise under the provisions of the collective bargaining agreement and constitute claimed violations there (Company Brief, pages 22-23).

The Court did not interpret any specific contract provision, nor did it decide the merits of the controversy. Nor did the Court hold that the Company was to be deprived of the benefits of any contract limitation or provision. In effect the Court said let the Arbitrator, within the limits of the labor agreement, make a determination on the matters presented to him (Company Brief, page 23).

2. The Court order directed arbitration "subject to the provisions of the Collective Bargaining Agreement insofar as the grievances arose under the provisions of the agreement and constitute claimed violations thereof." This language places the burden on the Union to prove that the grievants are entitled to pensions or severance pay because of some contract provision." (Company Brief, page 23).

3. Section IV-B of the labor agreement provides that neither party will submit to arbitration either broad labor policies or plant-wide wage adjustments. It was not the purpose of the Court to issue a binding ruling that the issues

of severance pay and pensions were or were not broad labor policies. The Court said that the question of whether these were broad labor policies and therefore not arbitrable was to be decided by the Arbitrator (Company Brief, page 24).

The purpose of the words "broad labor policy" were included in the labor agreement in order to limit and qualify the broad general language of Section II B-5, and Section III-A, insofar as arbitration of broad labor policies is concerned. A broad labor policy is one which affects a substantial portion of the labor force (Company Brief, page 25).

4. When it became apparent to the Union that the Company would not agree to the Union's proposals with respect to pension and severance pay the Union decided to go to arbitration. These proposals clearly involve matters of policy not provided for in the existing contract. They were matters of broad labor policy and were not intended to be, nor are they arbitrable (Company Brief, page 26).

5. The Arbitrator has no power to add to, subtract from, or modify the contract provisions.

Section XXII-B, provided that "any section (or part thereof) of this Agreement may be added to, amended or rescinded only by mutual agreement between the parties hereto. Such additions, amendments, or rescindments shall be effective from the date they are jointly agreed to and signed," etc.

The above language means that the only way the contract can be modified is by mutual agreement of the signatories. In effect the above provision prevents an Arbitrator from writing, rewriting, adding to or subtracting from any part of the labor agreement (Company Brief, page 26).

An Arbitrator is not empowered to alter a contract under the guise of construction. In the present case the Union is endeavoring to secure by arbitration what it was unable to get by negotiations.

Pensions

1. The parties have contractually limited arbitration with respect to pensions to problems of *eligibility within the terms of the plan.*

Section XX-B, of the labor agreement provides: "Problems of eligibility within the terms of this pension plan that cannot be solved by the Pension Committee shall be the only pension problems subject to arbitration." This provision shows a clear and unambiguous restriction of the Union's right to arbitrate an extension or modification of the Pension Plan. This provision expressly deprives the Arbitrator of jurisdiction over the pension grievance.

The next paragraph, Section XX-C, *Eligibility,* provides for the basic yearly pension allowance which shall be paid to a retired employee who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company (Company Brief, page 31).

2. The demand for pensions for laid-off employees who can't meet the service and age requirements of the plan is not a subject of eligibility "within the terms of the plan." In order to grant pensions to such employees the Arbitrator would have to disregard the age and service requirements of the plan (Company Brief, page 32).

3. The word "hardship" (Section XX-J) refers to financial hardship which results from an employee's physical disability. The labor agreement contains no broad general provision for pensions in hardship cases (Company Brief, page 35).

4. In the summer of 1956 Porter closed down the steel plant and armor plate department. This closing resulted in the laying off of 400 employees. No demands were made

by the Union that pensions be granted to those who did not qualify under the provisions of the labor agreement. The exceptions were four employees who were near retirement, and were not eligible. Special arrangements were worked out in the 1956 negotiations to permit these employees to work until they could meet the requirements of 65 years of age and 25 years of continuous service. Since these four cases no exceptions have been made to 65-25 requirement. With the negotiation of the first labor agreement by Porter, in 1956, there "was a complete change of policy to which the Union never excepted." (Company Brief, pages 36-37).

5. The contract which become effective September 15, 1957, provided for a clear contractual separation of the Disston Pension Plan from the Porter Pension Plan. Under this agreement the Porter Company agreed to continue pension payments due under the Disston Plan, but it did not agree to continue the Disston Plan.

In 1957 Porter agreed to provide its own Pension Plan which would be administered by the Management General Pension Board, Henry Disston Division. The Porter Plan, which was in effect in 1959, while substantially the same in substance was administered by different people under different policies (Company Brief, pages 37-38).

6. Mr. Hydrick clearly explained the pension policy which was in effect in 1959 when he informed the Union that the Company would abide by the contract provisions but that it had no intention of altering the existing pension plan. Those who were on pension would continue to receive it, and those eligible for pension within one year of lay-off would receive their pension.

The Company has, without exception, followed this pension policy. It is contended by the Company that there

is no foundation for the Union's attempt to have placed upon the Company a pension obligation greater than the Company bargained for because of an alleged practice in which H. K. Porter did not participate and which it discontinued (Company Brief, page 38).

Severance Pay

1. The labor agreement contains no provision relating to severance pay. Consequently, the Union's demand for severance pay cannot constitute a claimed violation of any such provision (Company Brief, page 39).

2. The only way in which the Union can secure severance pay for the workers involved would be for the Arbitrator to write a severance pay provision. In doing this the Arbitrator would be amending and supplementing the labor agreement which specifically provides that this can be done only by mutual agreement of the parties. In altering the contract the Arbitrator would be substituting his judgment for the negotiating talents and knowledge of the parties (Company Brief, page 39).

3. Past events clearly indicate that the Union recognizes the force of the Company's arguments. The Union presented a severance pay proposal in the wage reopening negotiations of January, 1959, but withdrew the proposal.

In July, 1959, the Company offered the Union an "Employee Assistance Plan" which was rejected by the Union. This shows that it was the intention of the parties to formulate a severance pay provision through the process of collective bargaining. It was intended, as a reading of the grievance will show, that the subject of severance pay should be a negotiable issue, not an arbitrable issue (Company Brief, page 40).

4. The Union argued that since the Company had offered severance pay the Arbitrator would not be writing anything into the contract that had not already been offered by the Company.

The Company points out that an offer alone, particularly if the offer has been refused, is not sufficient to alter the terms of contract. A party cannot reject an offer and then later claim the benefit of the offer (Company Brief, pages 40-41).

Summary

1. The Company has clearly shown that the Union's grievances are not arbitrable under the contract (Company Brief, page 42).

2. The Company has demonstrated that the Union has been unsuccessful in proving that the grievances arose under the provisions of the labor agreement and that the grievances constitute claimed violations of the Agreement (Company Brief, page 42).

3. In Joint Exhibit 1, the Union states that the Company, by refusing to bargain on the Union's counter proposal with respect to severance pay, was in violation of the National Labor Relations Act. However, the Union did not file an unfair labor practice charge against the Company. The Union did not file such a charge because the record shows that the Company offered by letter to discuss the subject and was also available and willing to discuss the matter in the September, 1959, negotiations. The Union was the party that refused to bargain (Company Brief, pages 42-43).

4. With respect to pensions the Union does not claim that the employees involved possessed any vested rights to receive pensions under the Pension Plan. In this arbitration proceeding the Union is demanding that these workers should be given some kind of vested rights, to be determined by the Arbitrator. If the Union had claimed that pension rights were vested it could have taken the matter to Court (Company Brief, page 43).

5. At no time during the arbitration hearing did the Union claim that this had been the case of a runaway shop, or that the Company had acted in bad faith.

Everything that the Company did in connection with the move to Danville, Virginia, was done frankly and openly (Company Brief, pages 43-44).

6. When the negotiations were begun for the contract, which became effective September 15, 1959, a considerable number of those who would be affected by the Danville move were still working. It was the responsibility and duty of the Union to represent these workers. The minimum monthly pension was increased and the severance pay was withdrawn. "The Union bargained for those people who were to remain in the employ of the Company at Tacony, but insisted on arbitration for those who had left and were to leave." (Company Brief, page 45).

7. The presence of pension provisions in a labor agreement is not a guarantee that every employee will receive a pension. The reduction of work because of marketing changes, technological changes, and economic conditions, is a constant threat to the continuation of employment until the time when an employee has met the age and length of service requirements of a pension plan (Company Brief, page 46).

ARBITRATOR'S OPINION.

Introductory Remarks

Inasmuch as the federal court ruled that the grievances with respect to pensions and severance pay are arbitrable the arbitrator is relieved of this duty.

The functions of an arbitrator are: (1) to determine the arbitrability of an issue if the parties request such a determination; (2) to determine facts and past practices; (3) to weigh the facts and determine the significance of past practices; (4) to interpret the contract; (5) to arrive at an award.

Attention is directed to the fact that an arbitrator may rule that a grievance is arbitrable but he may deny the remedy or claim sought by the grievant. For example an arbitrator held that whether the employer had the right to retire an employee for age was an arbitrable issue under a labor agreement which defined a grievance as any dispute involving the interpretation, application, etc. of the contract and which allowed the arbitration of any and all grievances so defined. However, in his award the arbitrator upheld the right of the Company to unilaterally establish a compulsory retirement age for all employees, where the labor agreement is silent on the subject. (General Aniline and Film Corporation, 25LA50.) Similarly an arbitrator held that the Union's protest against the employer's removal of the nurse from duty on the second shift was arbitrable. However, in his award the arbitrator held that the Company did not violate the labor agreement by removing the nurse from the second shift (Minneapolis-Honeywell, 28LA150 (1957).)

Attention is also directed to the fact that while courts hold that it is their function to determine arbitrability, they do not direct the arbitrator as to what award he shall arrive at. In the Warrior and Gulf Navigation Case, Justice

Douglas stated that "The Court should view with suspicion any attempts to persuade it to become entangled in the construction of the substantive provisions of a labor agreement." Justice Douglas also pointed out that "Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbitrator, not for the courts" (United Steelworkers v. Warrior and Gulf Navigation Company, 363 U. S. 575 (June 20, 1960)). In the American Manufacturing Company case which was decided on the same day as the Warrior and Gulf case Justice Douglas stated that "Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." Justice Douglas pointed out that "The Courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." In his concluding statement Justice Douglas stated that "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal" (United Steelworkers v. American Manufacturing Company, 363 U. S. 564 (June 20, 1960)). These decisions seem to make it clear that major role in the arbitration process is not to be played by the courts, but by the arbitrators selected by the Union and Company.

The above discussion as to the difference between the arbitrability of a grievance and the decision reached by the arbitrator with respect to upholding or denying the grievance, arises out of certain statements which are contained in the Union's brief. The Union states that: "for Arbitrator Buckwalter to deny severance pay on the ground that there is no provision in the applicable labor agreement providing

for severance pay is, *in reality,* a holding that the grievance as to severance pay is not arbitrable'' (Union Brief, page 3). In effect the Union is saying that since the Court has ruled that the severance issue is arbitrable, therefore the Arbitrator must rule in favor of the Union with respect to the severance issue. The above cited decisions of the United States Supreme Court clearly indicate that while it is the function of the Court to determine the arbitrability of a grievance, it is not the Court's function to determine whether the grievance shall be upheld or denied. On page 5 of its brief the Union states that ''Since it was for the Courts, by Porter's own admission, to decide on 'arbitrability' Arbitrator Buckwalter should not, either *directly* or *indirectly* overrule the Courts, but should agree that both grievances are arbitrable.'' The Arbitrator does not question the Court's ruling as to the arbitrability of the two issues in the instant case. However, after having studied the facts and arguments presented by the parties the Arbitrator is not bound to rule in favor of the grievant.

Let us examine the opinion of Justice John W. Lord, Jr., of the United States District Court for the Eastern District of Pennsylvania. The Court stated that ''As a matter of law, however, the Court determines that the pleaded withdrawal of severance pay demand would not work an estoppel as to plaintiff's alleged grievance involving severance pay. . . .'' (Union Exhibit No. 1, page 14a). It is the arbitrator's view that this statement cannot reasonably be construed to mean that the Arbitrator must rule in favor of the Union's grievance with respect to severance pay. Justice Lord states with respect to ''broad labor policies'' Section IV-B, of the labor agreement) that ''If contracting work to outside plants was not a function of management, it seems evident that the present disputes are not exempt from arbitration as 'broad labor' policies'' (Union

Exhibit No. 1, page 17a). Here again it seems clear to this Arbitrator that the Court is saying these issues, severance pay and pensions, must be submitted to an arbitrator, but the Court is not directing the Arbitrator as to whether he should grant or deny the relief sought by the Union.

In rendering his award the Arbitrator is bound to be guided by the following injunction expressed by Justice Douglas in the Enterprise Wheel and Car Corporation case: "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award" (United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U. S. 593 (1960)).

Attention is directed to the wording of Judge Lord's order dated April 11, 1961, directing the Company "to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay *insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof*" (Emphasis supplied). In the rendering of his award the Arbitrator must, therefore, keep in mind that according to the Court's order he can rule on these matters to the extent that they arise under provisions of the agreement and to the extent that provisions of the contract have been violated.

Pensions

The Demand for Arbitration with respect to pensions reads: "The Union grieves that the Company has misinterpreted and misapplied Article XX of the Agreement insofar

as the Eligibility for pensions of the employees affected by the Company's movement to Danville, Virginia is concerned."

Section XX, *Pensions, Paragraph C, Eligibility,* September, 1957 contract, provides: "Basic yearly pension allowance (without Social Security) which shall be paid a retired employee who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company...." (Joint Exhibit No. 2).

The introductory paragraph to Section XX, *Pensions,* provides that: "The Company agrees to continue pension payments as negotiated September 1, 1950, February 4, 1952, and July 15, 1953, with its predecessor Henry Disston & Sons, Inc." (Joint Exhibit No. 2).

The labor agreement dated August 16, 1950, effective September 1, 1950, provides the following with respect to pension eligibility: "Basic yearly pension allowance (without Social Security) which shall be paid a retired employee who has reached the age of 65 with at least 25 years of continuous service with the Company. . . ." (Union Exhibit No. 3).

The Arbitrator directs attention to the significant fact that above cited clauses, with respect to eligibility, are the same in both the 1950 and 1957 labor agreement.

The Memorandum of Agreement, dated September 1, 1956, and terminating September 15, 1957, between the Henry Disston Division of the H. K. Porter Company, Inc. and the Union provides that: "The Company will continue the pension plan negotiated between the Union and Henry Disston & Sons, Inc. except for the following changes" (Union Exhibit No. 2, page 2). No change is mentioned with respect to the 25-65 provision.

Attention is directed to the fact that the Supplemental Agreement, dated September 15, 1958, and running to Sep-

tember 15, 1959, made no change in Section XX (Joint Exhibit No. 3).

It is well accepted that a pension is paid primarily because of years of service and not because an employee has attained a certain age.

Justice Douglas, in the Gulf and Warrior Case states that: "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and shop—is equally a part of the collective bargaining agreement although not expressed in it." Let us now turn to the "law of the shop," the actual practice followed in the Tacony plant with respect to the determination of pension eligibility.

A study of the exhibits submitted at the Arbitration hearings indicates that in numerous cases over the years, it was the practice of the Pension Board to abide by the spirit of the eligibility clause, rather than by the wording of the clause. If the Pension Board had adhered literally to the letter of the provision it would have turned down a number of requests for pensions.

Although James Rose and Frank McKinney did not have 25 years of continuous servicethe Pension Board, in January, 1951, granted them pensions on the grounds that "special consideration was given in these cases because of the long period of total employment" (Union Exhibit 4c). The Pension Board made this decision in spite of an arbitration award, made shortly before, which denied the Union's request that Rose & McKinney were eligible for pensions (Joint Exhibit No. 28).

In August, 1951, the Pension Board increased the pension of Edward Riley over and above the eligibility as determined by the Union-Management Pension Committe. This increase was made because of Riley's "exceptionally long total service with the Company" (Union Exhibit 4i). Simi-

lar action was taken by the Pension Board in April, 1951, with respect to Peter McKenna (Union Exhibit No. 4h). Likewise in 1953 the Pension Board increased the pension of George Jackson and William Robinson, because of long service with the Company (Union Exhibit No. 4p).

In December, 1951, the Pension Board granted a pension to Fred Zitkovitz. The Board stated: "Mr. Zitkovitz has broken service and does not qualify for a pension under the 25 years continuous employment provision. The Board, however, has made an exception in this case" in view of the 37 years accumulated service and also in view of his age" (Union Exhibit 4k).

In March, 1952, the Pension Board "took some recognition of the eleven years of service of Richard Gundelswiler prior to his break in service of approximately 2½ years," and increased his pension (Union Exhibit No. 41).

In 1953, Frank Snyder and Thomas Bamford, who had been declared ineligible for a pension, were awarded pensions because of the length of the employees' service (Union Exhibit Nos. 4t, 4w). Snyder was 62 when he applied for a pension. He had a total of 44 years of service, 20 of which was continuous service (N. T. 268). Bamford was 58 when he applied for a pension. He had 41 years of continuous service (N. T. 268).

In June, 1955, Ivins Errickson, who had been declared ineligible for a pension, was given a pension "because of his unusually 'long service' " (Union Exhibit No. 4m).

Although employee George Southwell had a break in service of approximately 3 years in the early 1930's, the Pension Board, in February, 1956 awarded him a "special grant" of $75.00 per month, "because of his long total service with the Company." (Union Exhibits Nos. 4pp and 4qq). Similarly in 1956, Harry J. Mason and William Pritchard were each awarded "a special grant" because of

long total service with the Company. Mason received $40.00 per month, and Pritchard received $50.00 per month (Union Exhibits Nos. 4ss and 4uu).

With respect to the depression of the 1930's, Mr. Wilderman asked Mr. Norton, Personnel Director, the following question: "Are you aware as to whether or not Disston made any exceptions in some cases involving people whose employment was affected by the depression?" (N. T. 258). Mr. Norton replied: "My predecessor told me that breaks caused by the depression generally were not considered as a break by the Union-Management Committee" (N. T. 258). Norton testified that Harry Higham had 37 years of service, but only 9 years of continuous service prior to his application for a pension in 1950. His application was denied but subsequently he was granted a pension (N. T. 259).

Henry Schneider who had 43 years of service, 21½ years of which were continuous, applied for a pension at age 68 (N. T. 278). However, in spite of his being ineligible under the 25-65 rule, the Pension Board granted him a $35.00 monthly pension in 1954, "Because of his being affected by the closing of the File Company and his long total service with the Company." (Union Exhibit No. 4gg).

Mr. Juram's letter of July 22, 1954, indicated that one of the reasons why special action was taken by the Pension Board in behalf of George Hermanowicz and Leonard Hutchinson was the fact that "their retirement is influenced by curtailment of File Shop Operations." (Union Exhibit No. 4dd).

Mr. Juram's letter of July 22, 1954, indicated that one of the reasons why special action was taken by the Pension Board in behalf of Elmer Dutcher was the fact that "his retirement is influenced by the curtailment of Cold Rolling Operations." (Union Exhibit 4ee).

In December, 1951, the Pension Board approved a pension for Robert Kessler who was only 46 years of age. The

Board stated that "Mr. Kessler is only 46 years of age, however, the Board gave due consideration to his service of close to 30 years and in view of his present physical disability approved a pension of $35.00 per month." (Union Exhibit No. 4k). The Arbitrator directs attention to the fact the labor agreement in effect at that time provided for pensions for employees who had reached the age of 65 with at least 25 years of continuous service, and for employees who had 30 or more years of continuous service with the company and who had reached the age of 60. Attention is directed to the fact that Kessler fell into neither of these categories (Union Exhibit No. 3). Although the agreement then in effect (Union Exhibit No. 3) contained no provision with respect to special consideration in cases of physical disability and hardship, nevertheless the Pension Board saw fit to give weight to his physical disability in arriving at its decision to grant him a pension.

Let us again refer to the Warrior and Gulf Navigation case in which Justice Douglas pointed out that the source of the Arbitrator's law includes not only the express provisions of the labor agreement but also the practice of the shop ("industrial common law"). Examination of the decisions of the Pension Board over a span of several years clearly indicates that it was the practice of the Board to abide by the spirit, not the letter, of the eligibility clause. The Board followed a very humane and social approach in handling cases where there was doubt as to eligibility. In numerous instances where an employee had less than 25 years of continuous service a pension was granted because "special consideration was given because of the long period of total employment." Instances were cited of pensions being granted where the workers (Snyder and Bamford) had not met the age requirement but had long total service (44 years and 41 years). The Personnel Director, Mr.

Norton testified that breaks in service caused by the 1930 depression were generally not construed as breaks. In several instances the closing of a shop or the curtailment of the operations of a shop was a factor in influencing the decision of the Pension Board. In one instance a pension was given because of physical disability, to an employee who was only 46 years of age. This was done in spite of the fact that the labor agreement made no provision for a pension because of physical disability.

The fact that the Pension Board granted pensions to 2 employees who had been declared ineligible by an Arbitrator seems to clearly indicate a practice of broad and understanding application of the eligibility requirement.

It is the view of the Arbitrator that the various cases cited above, as well as others set forth in the transcript, clearly indicate that the Pension Board applied a broad, rather than narrow, concept of eligibility. The Company argues that it is not bound by what was done by the Board prior to labor agreement of September 1, 1956 (Union Exhibit No. 2). However, this agreement provides that the H. K. Porter Company will continue the pension plan negotiated between the Union and Disston. If we accept Justice Douglas' view that the collective bargaining agreement consists of the written provisions of the contract plus the practices of the shop then one must conclude that H. K. Porter is bound by the practice followed by the Pension Board, prior to 1956, with respect to eligibility.

The essence of the Union's position with respect to pensions is: (1) failure of numerous workers to qualify under the eligibility provision of Section XX, because of the move to Danville, will inflict upon these terminated employees a severe and permament economic loss; (2) the past practice over several years had been, in numerous exceptional or hardship cases, such as the instant case, to relax the precise written eligibility requirement.

The request of the Union for pensions for those who, at the time of their termination because of the Danville move, had completed 25 years of service but were not 65, and for pro rata pensions for those who were 65, but had not completed 25 years of service, seems entirely reasonable and in line with earlier decisions of the Pension Board. Surely if breaks in service during the depression of 1930 were overlooked, and surely if in 1954, a worker with 21½ years was given a pension because of the closing of the File Company, it would not be violating past practice in this plant for the Arbitrator to grant the Union's request. Nor would the Arbitrator be adding to the collective bargaining agreement since he would not be going beyond past practice with respect to the interpretation of eligibility for pension.

Employees who at the time of their termination had not completed twenty-five years of service and had not reached age sixty-five, are not entitled to a pension. A study of the period from 1950 to 1956 does not indicate that it was the practice to grant pensions to those who had not completed a total of twenty-five years of service and had not reached age sixty-five.

Long before Justice Douglas emphasized the practice of the shop ("industrial common law") as a part of the collective bargaining agreement arbitrators gave weight to past practice in interpreting the meaning of a contract provision. Arbitration files are replete with awards which were arrived at chiefly on the basis of past practice.

The Arbitrator rules that:

1. Each employee who, at the time he was terminated, had completed twenty-five years of service or more, but had not reached age sixty-five, shall be paid full pension.

The formula for payment to be worked out by H. K. Porter Company and the Union.

Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

2. Each employee who, at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

3. The request for pensions for employees who, at their termination, had not yet reached age sixty-five and who had not put in twenty-five years of service is denied.

Severance Pay

On page 123 of the transcript of the hearing the Union states: "If the Arbitrator is of the opinion that a proposal once made and a counterproposal made in reply thereto fall by the wayside where no agreement is reached, then our position is that pensions are one thing, severance pay is another."

With respect to severance pay the Union's case is, in the opinion of the Arbitrator, much weaker than is its claim for pensions. No provision has ever been included, with respect to severance pay, in any labor agreement between the parties. Even the September, 1959, agreement, which was signed after the dispute arose concerning severance pay for the terminated employees, contains no provision for severance pay. True, the subject of severance pay had been discussed in previous negotiations, and a proposal and counterproposal were made with respect to those terminated by the Danville move, but no agreement was reached.

In the case of pensions we have a certain pattern of past practice. However, in the case of severance pay no evidence was introduced to show that the Company has ever paid severance pay.

Examination of court and arbitration cases involving severance pay indicate preponderantly that where courts and arbitrators have granted severance pay there has been a severance pay provision in the labor agreement (e.g. Adams v. Jersey Central Power; 36LRRM2396, 37LRRM 2691; Bell Telephone Company of Pennsylvania and I. B. E. W. 36LA116). The absence of a severance pay clause has lead courts and arbitrators to refuse a request for severance pay. Justice Hofstadter of the New York Supreme Court stated that the court was sympathetic to the plight of workers who had lost their jobs, but that the court was powerless to act since the labor agreement was silent on severance pay (In re Lloyd, 32LA6). In the Textron Case the labor agreement contained no severance clause. The Arbitrator held that he had no power to grant severance pay (Textron, Inc. 12LA475).

The Arbitrator in the instant case is most sympathetic to the Union's request for severance pay; however, it is his opinion that he had no power to grant the Union's request. If the Arbitrator were to grant the Union's request he would be adding to the labor agreement and therefore would be violating Section XXII-B. Such an addition can only be made by negotiations between the parties.

Attention is again directed to the restraining words of Justice Douglas in the Enterprise Wheel and Car Corporation case: "An arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice—his award is legitimate only so far as it draws its essence from the collective bargaining agreement."

For the reasons set forth above the Union's request with respect to severance pay is denied.

Although the Union's request is not granted the Arbitrator strongly suggests, for humane reasons and in the interest of good industrial relations, that Company and Union representatives sit down again and make a sincere and intelligent effort to arrive at an agreement with respect to severance pay for those terminated as a result of the Danville move.

W. Roy Buckwalter,
W. Roy Buckwalter,
Impartial Chairman.

Dated: August 17, 1962.

APPENDIX D

Opinion of the United States District Court for the Eastern District of Pennsylvania, 217 F. Supp. 161 (1963)

H. K. PORTER COMPANY, Inc.

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION NO. 22254, AFL-CIO

Civ. A. No. 32367.
United States District Court
E. D. Pennsylvania.
May 10, 1963.

Pepper, Hamilton & Scheetz, Philadelphia, Pa., for plaintiff.

Wilderman, Markowitz & Kirschner, Philadelphia, Pa., for defendant.

JOHN W. LORD, Jr., District Judge.

Arbitration of grievances had been ordered by this Court as the outcome of Civil Action No. 27077, captioned United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO by Joseph Adair, President and Trustee ad litem v. H. K. Porter Company, Disston Division, 190 F.Supp. 407 (E.D.Pa.1960). Since there will be repeated references to the opinion in that case,

the following abbreviated caption will be used: United Saw Workers v. H. K. Porter.

Following the arbitration thus ordered, plaintiff brought the present action seeking to have vacated and declared void a part of the arbitrator's award. Defendant filed an answer and counterclaim asking enforcement of the arbitrator's award. Conceding that no questions of fact are involved, both parties have moved for summary judgment.

Judicial notice is taken of the files and prior proceedings of this Court in this matter. Further in the interest of brevity, the heretofore cited opinion of this Court in pertinent part is herein incorporated by reference: United Saw Workers v. H. K. Porter, 190 F.Supp. 407 (E.D.Pa. 1960). Although the parties were reversed in the prior proceedings, in that the former defendant is the present plaintiff, the entities before the Court are the same. For convenience they will hereafter be called Porter and Union respectively.

These controversies are connected with a certain manufacturing plant, in the Tacony section of Philadelphia, which was for many years operated by Henry Disston & Sons, Inc., a Pennsylvania corporation. That corporation, whose assets are now the property of Porter, will hereafter be called Disston. The factory in question will be spoken of as the Tacony plant.

In November, 1955, in exchange for Porter stock, Porter acquired substantially all Disston assets, subject to liabilities. Porter stresses in argument the fact that it did not acquire the stock or corporate entity of Disston. Thus, it says, there is no legal connection between Disston and Porter. As will be seen, however, that circumstance does not affect the ruling of this Court. It is well to note, however, that the bare statement "no legal connection" does not tell the whole story. At pages 11 and 12 of his opinion the arbitrator found in substance that Porter did agree to abide

by the pension "plan" in the Disston agreement with the Union and to continue to pay all "pensions" theretofore paid by Disston.

Since November, 1955, Porter's "Disston Division" has operated the business of manufacturing saws and hand tools, previously carried on at the former Disston plants, including that at Tacony.

At the time Porter acquired Disston's assets, there was in effect at Disston's Tacony plant a labor agreement between Disston and Union. Porter operated under that agreement until it expired, September 15, 1956.

Three recitals from the former opinion state further background of the reference to arbitration, United Saw Workers v. H. K. Porter, 190 F.Supp. 407, 408 (E.D.Pa. 1960):

> "(4) The plaintiff and defendant are parties to a collective bargaining Agreement dated September 15, 1957 and extended by a Supplemental Agreement dated September 15, 1958.
>
> "(5) In February of 1959, the defendant announced that it intended to move a large part of its production facilities from its Tacony plant to a plant in Danville, Virginia.
>
> "(6) Subsequent to the Company's announcement of its intent to move its plant, the Union and the Company had discussions of severance pay for employees affected and the pension rights of employees who would be laid off as a result of the move. No agreement was reached on these subjects."

In the cited opinion, it was held that these disputes were arbitrable. Appeal followed as to the form of order directing arbitration and finally, by direction of the United States

Court of Appeals for the Third Circuit, the following order was issued by this Court:

> "And now to wit, this 11th day of April, 1961, it is hereby ordered and decreed that the plaintiff's Motion for Summary Judgment in the above matter be, and the same is hereby Granted, and that Summary Judgment is hereby entered in favor of plaintiff, United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO, and that defendant is hereby ORDERED to conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the plaintiff, to select an Impartial Chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof. * * * "

In due course arbitration took place, culminating in the Award of Arbitrator dated August 17, 1962. W. Roy Buchwalter, Impartial Chairman, accompanied his award with a comprehensive opinion. There has been no suggestion of any procedural informality in the arbitration proceedings which led up to the award and opinion. Plaintiff's sole objection is that it exceeded the arbitrator's authority as to the matter of pension pay.

The award, apart from formal matters, is as follows:

> "*Pensions: The Arbitrator rules that:*
>
> "1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

"The formula for payment to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"3. The request for pensions for employees who, at their termination, had not yet reached age sixty-five and who had not put in twenty-five years of service is denied.

"*Severance Pay:*

"The Union's request for severance pay is denied."

It is difficult to discuss the arguments of counsel for Porter without going into the merits of arbitration. But how this Court could go into the merits of that award without flouting the Enterprise decision, among others, is difficult to see. United Steel Workers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

The Court of Appeals for the Third Circuit has had frequent occasion to interpret the famous trilogy of decisions handed down by the United States Supreme Court in June of 1960. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960);

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Judge Staley, observing that the ink was still fresh on those opinions, noted as early as January of 1961 that by those authorities a court cannot pass on the merits of the matter claimed to be arbitrable. International Tel. & Tel. Corp. v. Local 400, etc., 286 F.2d 329 (3rd Cir. 1961) (cases collected n. 4, p. 330).

More recently, the decisions to the effect that the courts cannot look into the merits of the arbitrator's award have been multiplying in the federal courts. Textile Workers Union of America v. Cone Mills Corp., 188 F.Supp. 728, 732, 736 (M.D.N.C.1960), aff'd 290 F.2d 921 4th Cir. 1961); Local Union No. 1241 of International Brotherhood of Electrical Workers v. Columbia Broadcasting System, Inc., 207 F.Supp. 423 (E.D.Pa. 1962); General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss and Company, Inc., 372 U.S. 517, 83 S.Ct. 789, 9 L.Ed.2d 918 (March 18, 1963).

To attempt to catalogue the spate of recent decisions affirming the rule would unnecessarily prolong this opinion. The only question, for that matter, is whether the pension matter was within the scope of the reference to arbitration.

The plain wording of the order of reference heretofore quoted required arbitration of

> "* * * the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof * * *"

It is to be noted that neither of the motions before this Court raise any question as to severance pay. The subject is mentioned here for the sole purpose of its bearing on the

main issue: the scope of the reference to arbitration. On the severance subject the Arbitrator wrote:

> "The Arbitrator in the instant case is most sympathetic to the Union's request for severance pay; however, it is his opinion that he has no power to grant the Union's request. If the Arbitrator were to grant the Union's request he would be adding to the labor agreement and therefore would be violating Section XXII-B. Such an addition can only be made by negotiations between the parties.
>
> "Attention is again directed to the restraining words of Justice Douglas in the Enterprise Wheel and Car Corporation case: 'An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice * * * his award is legitimate only so far as it draws its essence from the collective bargaining agreement.'
>
> "For the reasons set forth above the Union's request with respect to severance pay is denied.
>
> "Although the Union's request is not granted the Arbitrator strongly suggests, for humane reasons and in the interest of good industrial relations, that Company and Union representatives sit down again and make a sincere and intelligent effort to arrive at an agreement with respect to severance pay for those terminated as a result of the Danville move."

Thus the Arbitrator reluctantly denied the Union's claims for severance pay on the ground that he had no authority to make such award under the collective bargaining agreement. It is therefore abundantly clear that the Arbitrator was indeed aware of the limitations upon his authority.

As to the pension claims, he nevertheless found authorization to grant the Union demands. The Court order of reference to arbitration heretofore quoted specifies that the arbitration is to deal with grievances as to pensions insofar as covered by the collective bargaining agreement.

The positions of the Union and Porter are set out with care in the Arbitrator's opinion, commencing respectively at pages 5 and 7; then at page 9 the positions of both are summarized. His ruling on the pension phase consists of five closely written pages in his opinion commencing at page 11. To say the least for that discussion, it is in no possible sense vulnerable to attack on the ground that it is capricious or arbitrary.

Controversy centered about the following:

> "Section XX, *Pensions, Paragraph C, Eligibility,* September, 1957 contract, provides: 'Basic yearly pension allowance (without Social Security) which shall be paid a retired employee who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company. * * * ' (Joint Exhibit #2)."

Thereafter the Arbitrator considers other provisions in the same and later contracts which bear upon the interpretation of that clause. He also takes into consideration the practice which had prevailed as to interpretation of the clause above quoted saying:

> "A study of the exhibits submitted at the Arbitration hearings indicates that in numerous cases over the years, it was the practice of the Pension Board to abide by the spirit of the eligibility clause, rather than by the wording of the clause. If the Pension Board had adhered literally to the letter of the provision it would have turned down a number of requests for pensions.
>
> * * * * *

"In December, 1951, the Pension Board granted a pension to Fred Zitkovitz. The Board stated: 'Mr. Zitkovitz has broken service and does not qualify for a pension under the 25 years continuous employment provision. The Board, however, has made an exception in this case in view of the 37 years accumulated service and also in view of his age.' (Union Exhibit 4k)."

After reviewing about twenty cases of that nature, the Arbitrator reached the conclusion that those precedents should be followed, and wrote his award accordingly. This he had a right to do—and in so deciding, this Court arrives at the limit of its own authority. The matter of arbitrability is not an open one, having been settled several years ago. United Saw Workers v. H. K. Porter, 190 F.Supp. 407 (E.D. Pa.1960); see order of the United States Court of Appeals for the Third Circuit, No. 13439, March 24, 1961 and order of this Court April 11, 1961. This Court finds that arbitration under that authorization took place, and that the award of the arbitrator was within the scope of arbitration under the order of court heretofore cited. It is not now open to a court to reweigh the merits of the grievance. General Drivers, etc., Local Union No. 89 v. Riss and Company, 372 U.S. 517, 83 S.Ct. 789, 791, 9 L.Ed.2d 918 (March 18, 1963).

For the foregoing reasons, the Motion for Summary Judgment of plaintiff Porter is hereby denied, and the Motion for Summary Judgment of defendant Union is hereby granted, and it is so ordered.

APPENDIX E

Opinion of the United States Court of Appeals for the Third Circuit, 333 F. 2d 596 (1964)

H. K. PORTER COMPANY, INC.,
Appellant,

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA,
FEDERAL LABOR UNION NO. 22254, AFL-CIO.
No. 14509.

United States Court of Appeals
Third Circuit.

Argued Jan. 21, 1964.

Decided June 19, 1964.

Proceeding involving labor arbitration award. The United States District Court for the Eastern District of Pennsylvania, John W. Lord, Jr., J., 217 F.Supp. 161, ordered enforcement, and employer appealed. The Court of Appeals, Forman, Circuit Judge, held that labor arbitrator, in passing on dispute arising out of movement of production facilities, could, in view of prior practice of not requiring strict compliance with contract requirements that pensioners be 65 years of age with 25 years of continuous service, award pensions to employees with 25 years service even though they had not reached age 65, but could not, since there was no precedent for granting pensions to employees with less than required service, award pro rata pensions to employees who had reached age of 65 without serving required time.

Philip H. Strubing, Philadelphia, Pa. (Edward W. Madeira, Jr., Alfred W. Cortese, Jr., Philadelphia, Pa., on the brief), for appellant.

Louis H. Wilderman, Philadelphia, Pa. (Richard H. Markowitz, Wilderman, Markowitz & Kirschner, Philadelphia, Pa., on the brief), for appellee.

Before BIGGS, Chief Judge, and FORMAN and GANEY, Circuit Judges.

FORMAN, Circuit Judge.

H. K. Porter Company (hereafter the Company) acquired in November of 1955 substantially all the assets of Henry Disston & Sons, Inc. (hereafter Disston), who for many years maintained a steel production plant in the Tacony section of Philadelphia. The Company continued to operate this plant there until February of 1959 calling it the Henry Disston Division of the H. K. Porter Company. It then announced that it intended to move a large part of its production facilities from Philadelphia to Danville, Virginia.

Thereafter, United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO (hereafter the Union) and the Company, discussed, among other things, severance pay and pension rights of the employees. They, however, failed to agree thereon.

The Union brought an action in the United States District Court for the Eastern District of Pennsylvania[1] to compel the Company to proceed to arbitration under its collective bargaining agreement of September 15, 1957 as extended on September 15, 1958. The District Court held

1. Under § 301, Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1958).

that the disputes concerning severance pay and pension rights of the employees were arbitrable.[2]

After hearing the dispute, the Arbitrator,[3] on August 17, 1962, among other things, ruled:

> "1. Each employee who, at the time he was terminated, had completed twenty-five years of service or more, but had not reached age sixty-five shall be paid full pension.
>
> "The formula for payment to be worked out by H. K. Porter Company and the Union.
>
> "Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.
>
> "2. Each employee who, at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata

---

2. United Saw, File & Steel Prod. Wkrs. v. H. K. Porter Co.; 190 F.Supp. 407 (E.D.Pa.1960) : appeal followed as to the form of order and the U. S. Court of Appeals for the Third Circuit on March 24, 1961, issued its Order No. 13439, settling the terms, pursuant to which the District Court entered the following order:

"And now to wit, this 11th day of April, 1961, it is hereby ordered and decreed that the plaintiff's Motion for Summary Judgment in the above matter be, and the same is hereby Granted, and that Summary Judgment is hereby entered in favor of plaintiff, United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO, and that defendant is hereby ORDERED to conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the plaintiff, to select an Impartial Chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining Agreement and constitute claimed violations thereof. * * *"

3. W. Roy Buckwalter, Professor of Finance and Management, Temple University.

pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"3. The request for pensions for employees who, at their termination, had not reached age sixty-five and who had not put in twenty-five years of service is denied."

The Company filed an action in the District Court attacking the award. The litigation was brought to a head by motions for summary judgment filed by both the Company and the Union. For its part the Company sought to have the award vacated on the grounds that the Arbitrator had "exceeded his authority and the scope of the submission" and that he had "added to, amended and completely disregarded the explicit and unambiguous provisions of the Agreement." The Union, on the other hand, sought, among other things, an order that the Company perform the obligations set forth in the award of the Arbitrator.

The District Court denied the motion of the Company and granted the motion of the Union, ordering enforcement of the arbitration award,[4] from which the Company has appealed on the same grounds it asserted in attacking the award.[5]

In their collective bargaining agreements of September 1, 1950, February 4, 1952 and July 15, 1953, Disston and the Union treated the subject of pensions in part as follows:

"C. ELIGIBILITY. Basic yearly pension allowance (without Social Security) which shall be paid a retired em-

4. H. K. Porter Co. v. United Saw, File and Steel Prod. Wkrs., 217 F.Supp. 161 (E.D.Pa.1963).

5. The demand of the Union for severance pay was rejected by the Arbitrator and that claim is not included in this appeal.

ployé (sic) who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company, * * * ''

Provision was also made for retirement at age sixty with at least thirty years of continuous service.

After the acquisition of the Disston plant by the Company, it entered into a Memorandum of Agreement with the Union, dated September 19, 1956, as of September 1, 1956, containing, among other things, the following provisions:

> ''I A joint Union-Management Committee will be established to write a finalized Agreement to be entered into between the Union and the Henry Disston Division of H. K. Porter Company, Inc. of Pittsburgh, and shall use for such purpose the Agreement between the Union and Henry Disston & Sons, Inc. Included in the rewrite shall be the following:''
>
> * * * * *
>
> ''G) *Pensions:*
>
> ''The Company will continue the pension plan negotiated between the Union and Henry Disston and Sons, Inc., except for the following changes:
>
> > ''1) Elimination of the provision of eligibility for pension at age 60 with 30 or more years of continuous service.''

Approximately a year later, on September 16, 1957, the Company entered into a collective bargaining agreement with the Union containing the following provisions:

> ''*Section* XX—Pensions.
>
> ''The Company agrees to continue pensions payments as negotiated September 1, 1950, February 4, 1952 and July 15, 1953 with its predecessor Henry Disston &

Sons, Inc. The Company will also provide for all employes (sic) covered by this Agreement the following Pension Plan:

"A. The administration of this Pension Plan shall be in the charge of the Management General Pension Board, Henry Disston Division, H. K. Porter Company (Delaware) Hourly Employes (sic) Pension Plan.

"B. UNION MANAGEMENT PENSION COMMITTEE. A pension committee consisting of three members from Management and three members from active Union membership shall review eligibility problems * * * Problems of eligibility within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration, * * *

"C. ELIGIBILITY. Basic yearly pension allowance (without Social Security) which shall be paid a retired employe (sic) who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company, shall depend upon two conditions:

"1. The number of years of continuous service the employe (sic) has with the Company. The length of continuous service of an employe (sic) shall be computed from the date on which he or she first began work. * * * "

* * * * *

"2. The amount of the employe's (sic) average regular yearly earnings, * * * "

Pensioned employees were also entitled to life insurance policies under the Agreement on the following basis:

"*Section XIX*—LIFE INSURANCE.

"A. The Company will provide to all employees covered by this Agreement, including the Union President

and Union Secretary, effective on the day after completing one month of continuous service with the Company, a $2500. non-contributory Life Insurance policy until retirement date; and on the First of the month following the employe's (sic) pensioned retirement, a $1000, non-contributory Life Insurance Policy while on pensioned retirement. * * *

Other provisions of the Agreement related to arbitration in part as follows:

"*Section III*—ADJUSTMENT OF GRIEVANCES

"A. Should differences arise between the Company and the Union or any of its members as to the meaning and application of the provisions of this Agreement or should any grievance arise between the parties hereto, there shall be no stoppage of work, strike or lockout on account of such differences, but an earnest and sincere effort shall be made by the parties hereto to settle such differences in the following manner:"

* * * * *

"*Section IV*—IMPARTIAL CHAIRMAN

"A. The Impartial Chairman shall be chosen by mutual agreement between the Union and the Company. * * *

"B. The use of arbitration is confined to grievances of individuals or groups and neither the Company nor the Union agree to submit to arbitration either broad labor policies or plant-wide wage adjustments.

"C. The Impartial Chairman shall have the authority to make final decision in such cases where the Union and the Company cannot agree."

The Arbitrator ruled that he was without power to grant allowance of severance pay, absent any authority thereon in the collective bargaining agreement. To do so,

he reasoned, would be to make an unauthorized addition to the agreement in violation of Section XX-B. He therefore rejected the Union's request for severance pay.

The Arbitrator, however, differentiated his interpretation of the pension clause of the agreement from severance pay on the ground that there were patterns of past practice with regard to pensions, not present in the instance of severance pay. He believed that these practices, although carried out not by the Company but by Disston, demonstrated that the Pension Board had abided by the spirit of Section XX rather than by its exact wording. Consequently, the Arbitrator held that this justified a broader interpretation than a mere literal reading of the eligibility clause which called for sixty-five years of age and twenty-five years of continuous service before the granting of a pension.

After analyzing the evidence submitted to him, the Arbitrator in fact found twenty cases between 1950 and 1955, wherein there was deviation from a strict interpretation of the eligibility requirement. In his opinion he stated:

> "* * * In numerous instances where an employee had less than 25 years of continuous service a pension was granted because 'special consideration was given because of the long period of total employment.' Instances were cited of pensions being granted where the workers (Snyder and Bamford) had not met the age requirement but had long total service (44 years and 41 years). The Personnel Director, Mr. Norton testified that breaks in service caused by the 1930 depression were generally not construed as breaks. In several instances the closing of a shop or the curtailment of the operation of a shop was a factor in influencing the decision of the Pension Board. In one instance a pension was given because of physical disability, to an employee who was only 46 years of age. This was done in spite

of the fact that the labor agreement made no provision for a pension because of physical disability."

The Memorandum of Agreement of September 1, 1956 between the Company and Disston provided that the former would continue the pension plan negotiated between the Union and Disston. For this reason, the Arbitrator concluded that he should consider the pension practices of the former employer Disston.

The Company argued that it was in no wise bound by the practices prevailing under the Disston agreement. It asserted that while a plan for pensions was perpetuated by the agreement between the Company and the Union which prevailed in 1959 generally similar to the scheme followed under the Disston agreement, there was a difference in some terms and new policies were contemplated to be carried out by new personnel. The Company further submitted that the Arbitrator construed not the contract with the Company but the one with Disston. It contended also that the second part of the award of the Arbitrator which granted pensions to employees with less than twenty-five years of service is completely unsupported even by any of Disston's prior practices and must be vacated.

I

The parties conceded that the District Court properly refused to review the merits of the arbitration award.[6] To be valid, however, an arbitrator must draw the essence of the award from the collective bargaining agreement.[7] An arbitrator should not dispense his own brand of industrial justice, but must confine himself to the interpretation and application of the collective bargaining agreement.[8] He

6. United Steelworkers, etc. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424, 1427 (1960).

7. Id. At 597, 80 S.Ct. at 1361, 4 L.Ed. 2d at 1428.

8. Ibid.

may, nevertheless, "look for guidance from many sources."[9] The Supreme Court has said:

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. * * * "[10]

We disagree with the contentions of the Company that the Arbitrator in this case was precluded from considering the pension practices under the Disston agreement, for a provision of the Memorandum of Agreement of September 19, 1956 committed it to "continue the pension plan negotiated between the Union and Henry Disston and Sons, Inc. * * * "

It should be remembered that the arbitration proceedings in this case arose out of the grievances of employees whose services with the Company were terminated in 1959 when the Company removed a large part of its Disston facilities from Philadelphia to Danville, Virginia. The first part of the Arbitrator's ruling went no further in prospective effect than to rule that those employees who had rendered the Company and its predecessor twenty-five years or more of service and whose jobs were terminated by reason of the removal of the plant should not suffer the loss of pensions even though such employees had not attained sixty-five years of age.

In the margin is a list of the instances examined by the Arbitrator where the length of service had influenced the Pension Board of Disston to grant pensions to employees

---

9. Ibid.

10. United Steelworkers, etc. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-582, 80 S.Ct. 1347, 1352-1353, 4 L.Ed.2d 1409, 1416-1417 (1960).

notwithstanding the failure of strict compliance with the eligibility clause of sixty-five years of age and twenty-five years of continuous service.[11] Under the circumstances of

11. *Abstract of Arbitrator's Analysis of Previous Practices*

Name of Employee	Age at Termination	Previous Years of Service	Continuous Years at Termination	Years of Total Service
1. James Rose*	68	34	12	46
2. Frank McKinney*	73	28	20½	48½
3. Edward Riley**	78	29	27½	56½
4. Peter McKinney**	71	26	28½	54½
5. George Jackson**	65	19	32	51
6. William Robinson**	70	36	20½	56½
7. Fred Zetkovitz***	70	16	31	37
8. Richard Gundelswiler**	77	11	48	59
9. Frank Snyder***	62	24	20	44
10. Thomas Bamford***	58		41	41
11. Irving Errickson***	67	20	21¾	41¾
12. George Southwell****	68			46
13. Harrd J. Mason#	74	27½	23½	51
14. William Pritchard#	73			53½
15. Harry Higham***		28	9	37
16. Henry Schneider***	68	21½	21½	43
17. George Hermanowicz##	64	7	35½	42½
18. Leonard Hutchinson##	64		50	50
19. Elmer Dutcher##	61		47½	47½
20. Robert Kessler###	46		30	30

* Declared ineligible for pension by arbitration but granted by Pension Board.

** Granted small increase in pension on account of exceptionally long total service.

*** Awarded pension notwithstanding broken service.

**** Three and a half years of work lost during depression not considered a break in continuous service.

Record shows special grant.

Terminated with closing of File Division in 1954. Ineligible for Social Security until age sixty-five, granted increased pension until qualified for Social Security.

Given a grant or pension on account of physical disability.

this case these practices formed a source of guidance to which the Arbitrator was authorized to look, in interpreting the eligibility clause of the agreement. The Arbitrator acted entirely within his competence in granting the pensions based on duration of service. The District Court properly approved these findings and conclusions. Hence the Judgment of the District Court with regard to the Part I ruling of the Arbitrator will be affirmed.

II

Examination of the record, however, has failed to reveal any support for the second part of the Arbitrator's award. There he ruled:

> "2. Each employee who, at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.
>
> "Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A."

The Arbitrator said in his opinion:

> "It is well accepted that a pension is paid primarily because of years of service and not because an employee has attained a certain age."

Assuming the accuracy of this statement, it gives support to the allowance of pensions to employees for long service (over twenty-five years continuous or total), but it defeats the conclusion that the employee should be granted a pension when he has reached the age of sixty-five regardless of his years of service.

A reference to the cases examined by the Arbitrator upon which he bases his authority to deviate from the clear and unambiguous words of the eligibility clause discloses in all twenty cases each employee rendered not less than twenty-five years of total service.[12] Indeed, the minimum was thirty years and the maximum fifty-nine years. In all instances except two where the employees were under sixty-five years, they qualified for pensions, being over sixty and having thirty years of service. In the two under sixty, one was forty-six years of age with thirty years of service, but was given either a grant or a pension on account of physical disability. The other was fifty-eight but had forty-one years of service and no reason appears for the grant to him.

That the Company was moving its plant to a new location may have invoked hardship on older employees. Yet, absent any provision either explicitly or implicitly authorizing the Arbitrator's ruling in Part 2 of his award, or any prior practice which reasonably could so interpret it, he lacked a basis for his conclusion. As already stated, the Arbitrator may not administer his own brand of industrial justice.

We find that in Part 2 of the award the Arbitrator had no ground upon which to base his interpretation of the clear and unambiguous words of the eligibility clause. Standing by itself, it gave him no room to construe it in any manner than according to its plain meaning. Bereft of any practice evidencing a relaxation of the requirement of years of total service and relying only upon age, the Arbitrator was unjustified in deviating from the plain mandate of the eligibility clause, as it concerned those who fulfilled only the portion making the age of sixty-five a requirement. Indeed, such an interpretation neither goes to the essence nor to the application of the collective bargaining agreement. The

12. Ibid.

District Court erred in holding that the Arbitrator did not exceed his authority when he ruled that:

> "2. Each employee who, at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.
>
> "Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A."

Accordingly, the judgment of the District Court to that extent will be reversed. The case will be remanded with instructions to enter judgment in favor of the Company insofar as Part 2 of the Arbitrator's award is concerned, pursuant to the views expressed herein.

APPENDIX F

Order and Judgment of United States District Court for the Eastern District of Pennsylvania

---

ORDER AND JUDGMENT
December 7, 1964

AND NOW, this 7th day of December, 1964, pursuant to the Judgment of the United States Court of Appeals for the Third Circuit remanding the case to this Court, it is ORDERED:

1. The motions for summary judgment of plaintiff and defendant are granted in part and denied in part.

2. The arbitration award of Professor W. R. Buckwalter is hereby enforced as to paragraph 1 thereof as follows:

> "Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five shall be paid a full pension.
>
> "The formula for payment to be worked out by H. K. Porter Company and the Union.
>
> "Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

3. Paragraph 2 of the arbitration award of Professor W. R. Buckwalter is vacated and declared void and unenforceable. Said paragraph reads as follows:

"Each employee who, at the time he was terminated had reached age sixty-five but had not completed twenty-five years of service shall be paid a pro-rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, or the terms of paragraph 1 of the arbitration-award as quoted above, then either party shall apply to this Court under the above caption for such action as it deems appropriate.

5. Each party shall bear its own costs.

6. The Clerk shall enter judgment in accordance herewith.

BY THE COURT
JOHN W. LORD, JR., J.

APPENDIX G

Opinion and Award of Arbitrator Donald A. Crawford

ARBITRATOR'S OPINION & AWARD

IN THE MATTER OF ARBITRATION BETWEEN
UNITED SAW, FILE AND STEEL PRODUCTS
WORKERS OF AMERICA, Federal Labor
Union No. 22254, AFL-CIO

and

H. K. PORTER COMPANY, INC.

APPEARANCES:

FOR THE COMPANY—Pepper, Hamilton & Scheetz by Edward W. Madeira, Jr. and Alfred W. Cortese, Counsel; Paul R. Obert, Secretary and General Counsel, H. K. Porter Company; Walter E. Norton, Industrial Relations Manager, Philadelphia Works; Robert T. Rainey, Supervisor, Pensions and Trusts.

FOR THE UNION—Wilderman, Markowitz & Kirschner by Louis W. Wilderman, Counsel; Anthony Wahner, President; William Sauers, Secretary-Treasurer; Donald A. Grubbs, Actuary.

BACKGROUND

This matter goes back to August, 1959 when the Union grieved requesting severance pay and pensions after the Company had announced its intention to move a large portion of the operations of its Philadelphia plant to Danville,

Virginia. The Company contested arbitrability. On April 11, 1961 Judge John W. Lord of the United States District Court directed the Company to:

> ". . . conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the Plaintiff, to select an Impartial Chairman and to submit to arbitration, subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such

(2)

> grievances arise under the provisions of the Collective Bargaining Agreement, and constitute claimed violations thereof . . ."

Thereafter, W. Roy Buckwalter arbitrated the dispute. The grievances before him are set forth in the opinion accompanying his award, dated August 17, 1962, as follows:

> "The issues to be arbitrated relate to pensions and severance pay, as required by the Order of the United States District Court for the Eastern District of Pennsylvania . . .
>
> "The Union grieves that the Company has misinterpreted and misapplied Article XX of the Agreement insofar as the eligibility for pensions of employees affected by the Company's movement of its plant to Danville, Virginia, is concerned. In addition, the Union grieves that the Company's proposal entitled "Employee Assistance Plan for Employees affected by the Danville Move' is unacceptable and the Company has refused to discuss counter-proposals submitted by the Union, or to take any action thereon in the making of adequate provision for employees affected by the Company's move to Danville, Virginia."

The Award states:

"*Pensions: The Arbitrator rules that:*

"1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

"The formula for payment to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro-rata pension based on an equitable formula to be worked

(3)

out by H. K. Porter Company and the Union.

"3. The request for pensions for employees who, at their termination, had not yet reached age sixty-five and who had not put in twenty-five years of service is denied.

"*Severance Pay:*

"The Union's request for severance pay is denied."

The Company sought to have this Award vacated. On May 10, 1963 the District Court[1] granted enforcement of the

1. *H. K. Porter, Inc. v. United Saw, File & Steel Products Workers*, 217 F. Supp. 161 (E.D. Pa. 1963).

Award. On June 19, 1964 the Court of Appeals for the Third Circuit reversed the judgment of the District Court to the extent that such judgment enforced Paragraph 2 of the Award.[2] On December 7, 1964 Judge Lord entered a further order and Judgment which, reads in Paragraphs 2 and 4 as follows:

> "2. The arbitration award of Professor W. R. Buckwalter is hereby enforced as to paragraph 1 thereof as follows:
>
> 'Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five shall be paid a full pension.
>
> 'The formula for payment to be worked out by H. K. Porter Company and the Union.
>
> 'Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.' "
>
> "4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relation Act of 1947. In the event differences of disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for

(4)

> payment, of the terms of paragraph 1 of the arbitration award as quoted above, then either party shall apply to this Court under the above caption for such action as it deems appropriate."

---

2. *H. K. Porter, Inc. v. United Saw, File & Steel Products Workers*, 333 F. 2d 596 (3rd Cir. 1964).

The parties could not agree. The Union has insisted that full pensions be paid as of the time of termination irrespective of age; the Company, at age 65. The Union has claimed that men with 24 years of service at time of termination are entitled. The Company has said not, and also that men who died before reaching age 65 are not entitled. The Union has asked funding, joint administration, and interest. The Company has contested arbitrability. The claims of four individuals have been in dispute.

The parties did not follow the predictable course and apply to the District Court for decision as permitted in the December 7, 1964 Order or ask Arbitrator Buckwalter what he intended by his Award. Instead they chose a second arbitrator, who must rely on the award, opinion, contract and proceedings to determine what Buckwalter intended by his Award.

Hearings were held on July 22 and 23, 1965. Briefs were submitted on November 5, 1965. Oral argument occurred on December 16, 1965. On January 21, 1966, the arbitrator wrote the parties as follows:

"Gentlemen:

"After considerable study of the record I do not interpret the award to require that a 25 year-service employee reach age 65 before he is paid a pension. I consider this issue to be a matter of interpretation within my jurisdiction. I will submit a formal opinion and award on this issue subsequently.

(5)

"This question of course is the threshold issue, and its determination may make it possible for the remaining issues to be resolved. To facilitate a faster resolution of the case and to avoid the possibility of further

litigation, I am referring back all of the other issues raised at the hearing and in the briefs. These are (1) actuarial reduction of the pension amounts, (2) the 24-year-service group, (3) the rights of certain specified individuals, (4) interest, (5) calculation of social security, (6) funding, (7) joint administration, (8) life insurance, etc.

"I am retaining jurisdiction in the event you do not want to negotiate or cannot settle the remaining issues. Should the remaining issues be referred back for an award, proposals made in the course of negotiations will of course be unknown to me and therefore cannot prejudice either party."

Negotiations pursuant to this letter continued into May, but finally proved unsuccessful. On June 3, 1966 the arbitrator met with the parties to better understand some of the cost estimates. He also requested the transcript and exhibits in the Buckwalter case, and the briefs submitted by the parties to the courts. He received the transcript and some, but not all, of the evidence. The Award is the conclusion as to what was intended by Buckwalter based on all of this material.

The cost of the Union's demands run far in excess of a million dollars. The Company considers its obligation under Paragraph 1 of the Buckwalter Award to be in the neighborhood of a quarter million dollars.

(6)

THE PARTIES' ARGUMENTS

The key questions raised by the parties' respective interpretations of Paragraph 1 of the Buckwalter Award are arbitrability, to which the Company devotes a substantial

part of its brief, and whether or not grievants with 25 years or more of continuous service are entitled to payment of full pensions as of time of termination regardless of age. Throughout the court and arbitration proceedings the Company has relied on the express provisions of the contract; has contested arbitrability on the basis of the general and special limitations on arbitration in the contract; and argues that pension payments for employees under age 65 is not an arbitrable issue. The Company also maintains that no practice exists for pension payments to underage employees. The Union has argued throughout all the proceedings that the Arbitrator has authority to award the Union's demands, and has relied on the practices of the Pension Board and the concept of unjust enrichment.

More specifically, the Company objects to the arbitration of the grievances insofar as they go beyond question of eligibility. "There is no waiver on the part of the Company of any right to have such question of arbitrability resolved by the court."

The Company quotes Section IV of the September 16, 1957 Agreement, which excludes "broad labor policies" and "plant-wide wage adjustments" from arbitration, and Section XX-B which expressly limits the authority of an arbitrator in matters involving pensions to problems

(7)

of eligibility:

> "Problems of eligibility within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration. . . ."

The Company says that Arbitrator Buckwalter recognized this limitation upon his authority for his Award goes

no further than to decide the general category of employees eligible for pensions. Indeed, he refers to a "formula for payment to be worked out" by the Company and the Union. Accordingly, the only issues are whether employees under age 65 with 24 years of continuous service at time of termination and certain specified grievants are eligible for pensions under Paragraph 1 of the Buckwalter Award.

What is not arbitrable, the Company continues, are the ingredients of the formula for payment as requested by the Union:

1. Funding of the pension plan by the Company.
2. Joint administration of the pension plan.
3. Payment of pension should commence as of the date of termination of employment rather than at age 65 as specified in the contract.[1]
4. The Company should pay interest on the fund from the date of termination of employment of the employees concerned until the present.

The Company cites *Atkinson v. Sinclair Refining Company,* 370 U.S. 238 (1962), *United Steelworkers of America v. Warrior and Gulf Navigation Co.,* 363 U.S. 574, 582 (1960) and *Boeing Co. v.*

(8)

International U., United A., A & A. I. Workers, 234 F. Supp. 404 (E.D. Pa. 1964) to the effect that arbitrability is for the courts; that the contract can specifically exclude certain issues from arbitration; that arbitration cannot be ordered where the parties have specifically excluded it.

---

1. This issue raises questions of actuarial reduction, applicability of the minimum guaranteed pension and deaths before age 65.

The Company contends that the exclusion language of Section XX-B is clear and that there is no controversy here over the meaning of "eligibility." Accordingly, this case is unlike *Desert Coca Cola Bottling Co. v. General Sales Drivers*[1]—"Wages"—and *Silvercups Bakers, Inc. v. Strauss*[2]—"delivery methods"—where the exclusion clauses have failed because of ambiguity and vagueness. Rather, this case is like *Communication Workers of America v. New York Telephone Co.*[3]—"Section 9.08"—and *Boeing Co.* supra—"listed management prerogatives"—where the exclusion clause has been held sufficiently clear to bar arbitration. Therefore, the only question for arbitration is which employees are eligible for pensions.

Concerning the Union's request for payment of pensions upon termination of employment, the Company argues that the Union's counter-proposal to the Company's severance pay proposal indicates that the Union recognizes that payment starts at age 65; that the parties' bargain, as spelled out in Section XX-C, is the payment of a pension to a "retired employee who has reached the age of sixty-five . . . "; that Buckwalter's Award did not change this term; that the Union now asks the Arbitrator to impose upon the Company a tremendous liability

(9)

entirely different from that set forth in the contract by granting employees pensions upon termination of employment even though one was only 42 years old at such time.

The Company points out that the Court held that Buckwalter could alter the Eligibility clause on the basis of practice, but that the practice must be well documented to

1. 335 F. 2d 198 (9th Cir. 1964).
2. 60 LRRM 2103 (E.D. N.Y. 1965).
3. 327 F. 2d 94 (2nd Cir. 1964).

permit deviation from the contract. Referring to the Opinion of the Circuit Court of Appeals, the Company notes that the Court said that in all cases of past practice except two the employees qualified for pensions, being over sixty and having 30 years of service. Relying on Webster's definitions, the Company contends that two instances do not make a well documented practice.

The Company argues further that these two instances, and one more in evidence, are physical disability cases; that this is why pensions were paid at an early age; that moreover, these cases occurred prior to 1957, since when the contract has been amended to provide for physical disability case;[1] that accordingly, there is no practice to support payment of pensions before age 65 and therefore the Eligibility clause must control.

Concerning arbitrability, the Union replies that this question has been decided long ago, and finally by the courts, as has been the issue of enforceability. It asks that the Company take

(10)

notice of the decisions—especially paragraph 4 of Judge Lord's December 7, 1964 Order. Under this Paragraph, the Union argues, Arbitrator Crawford's jurisdiction includes the issues spelled out in that Paragraph.

As to its request for payment of pensions at time of termination, the Union argues that an unprecedented situation is presented here in the Company's closing of 80 percent of its plant; that this action made it impossible for

1. Section XX-J of the September 16, 1957 contract, which reads: "In cases of physical disability and hardship, a special consideration will be recommended to the Management General Pension Board for employees who are at least sixty but less than sixty-five years of age and who have thirty or more years of continuous Plant Service."

the grievants to perform their side of the pension bargain —to supply 25 years of continuous service and attain age 65; that their non-performance did not harm the Company but rather resulted from a company action taken for its own benefit; that therefore the Company may not refuse its side of the bargain—to pay pensions.

The import of the Union argument is that pensions are deferred wages, accruing in this case at the rate of ½ percent of payroll per year since 1950; that in addition, the Company was obliged under the pension plan to provide for years of service of its employees prior to 1950; that the employees gave up a share of immediate wage increases to secure deferred wages in the form of pension benefits; that to the extent that the Company takes the money represented by this accrued liability, it is being unjustly enriched; that of the original 350 grievants—all of whom have an equitable claim on this ground—280 come away from this arbitration empty-handed; that further, when Porter bought Disston in 1956, it undoubtedly

(11)

considered the accrued and accruing liability for pensions and the sales price would have been reached with this liability in mind; that therefore the Company has received in the form of a lower purchase price the money represented by the pension obligation accrued as of 1956; that there were 1,000 to 1,200 employees when Porter took over as contrasted with approximately 200 employees after termination; that as of 1959 only 250 pension applications had been filed.

The Union argues further that the Company ignores the income side of the pension plan, focusing its attention on the outgo side—the express obligation to pay pensions to employees who attain age 65 and have at least 25 years of continuous service; that however, the 65/25 eligibility

requirements contemplated that the plant would continue; that labor contracts, although they specify a fixed short term of one, two or three years, actually contemplate a continuing relationship; that thus they provide through deferred wages for such benefits as longer vacations for 25 years of service, pensions at specified ages, severance pay, etc.; that this concept is part of the nature of the labor contract and is so recognized by arbitrators[1] and by the Courts.

Thus, the Union concludes, while the contract expressly provided a bargain which obligated the Company to pay pensions only to those employees who meet the 65/25 eligibility requirements, it also contemplated that the participants would gain the benefits of the deferred wage payments negotiated in 1950, that the bargain in 1950 did not contemplate that the Company could close the plant and take the deferred wages for itself.

(12)

THE FINDINGS

ARBITRABILITY

The Company is not persuasive when it contends that the question of when pension payments start is not a matter of eligibility and therefore not arbitrable. The pension issue before Buckwalter was whether employees terminated by the Company's movement of most of its plant to Danville must be 65 years of age and have 25 years of continuous service, as specified in the contract, to be eligible for pensions. The courts had already decided that this issue did not involve "broad labor policies" and "plant-wide wage adjustments" and directed arbitration. And Buckwalter decided, as set forth in Paragraphs 1 through 3 of

1. *Wamsutta Mills, Inc.* and *Textile Workers Union of America*, Arbitrator John A. Hogan (34 LA 158, September 9, 1959).

his Award, whether a terminated employee need be 65 or need have 25 years of continuous service or neither in order to be eligible for a pension.[1]

Now the parties disagree as to the interpretation of Paragraph 1: whether Buckwalter intended that a claimant is eligible for a pension upon termination, as the Union argues, or upon reaching the age of 65, as the Company maintains. Thus the basic question remains a matter of eligibility—must one be 65 years of age.

Moreover, this Arbitrator's jurisdiction was in fact defined at the hearing, as the following excerpt from the transcript shows (Tr. 7-13):

"THE ARBITRATOR: My jurisdiction then comes under this Court Order?

(13)

"MR. MADEIRA: Your jurisdiction comes under all the documents.

"THE ARBITRATOR: Under all the documents, including this Directive of the Court, and at issue, here is Paragraph 2; is that correct?

"MR. WILDERMAN: When you say his Order, you are referring to the Order of December 7, 1964, Mr. Crawford?

"THE ARBITRATOR: Yes Judge Lord's.

"MR. MADEIRA: My understanding is that that is correct, sir, and your jurisdiction comes from all

1. The Circuit Court of Appeals would not enforce Paragraph 2 of the Award—not because the issue was not a "problem of eligibility" —but because the Award was not based on "any practice evidencing . . . [deviation] from the plain mandate of the eligibility clause." Had there been such evidence, presumably Paragraph 2 also would have been enforced as was Paragraph 1.

the documents, and we are particularly concerned with paragraph 2 of Union's exhibit 1.

"MR. WILDERMAN: Which is . . . [Judge Lord's] Order of December 7, 1964."[1]

Accordingly, the Arbitrator understood, and understands, his jurisdiction to include any disputes "as to the interpretation and application and/or method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award." In fact, this is the only dispute among "all the documents" which has not already been decided.

The Court stood ready to decide any differences over the meaning or application of the Award and the formula formula for its payment. The parties, instead, brought their dispute over the Award to an arbitrator. It is hardly persuasive therefore when one party says the arbitrator does not have the authority to decide differences over the interpretation and formula for payment of the terms of the Award. This decision, of course, must be based on the Award, opinion, contract, evidence, arguments, court actions, and arbitration promise on

(14)

which that Award was based.

The following quotation from *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960) at 597 provides guidance for the arbitration in performing this function:

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to

1. Quoted at p. 3 of this opinion.

reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless an arbitrator does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Arbitrator Buckwalter relied on this case and on *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960):

> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . ."

And he found that men who had not yet reached age 65 at time of termination shall be paid a full pension and that the parties should work out a formula for payment. The Court held this Award to be within the scope of the arbitration promise. Surely the deciding

(15)

of a dispute over the interpretation of that Award and the fashioning of a formula for its payment is within the scope of the court ruling and the arbitration promise.

In recapitulation, the Company agrees that the Arbitrator's jurisdiction comes from "all the documents" including Judge Lord's December 7, 1964 order. But it contends that the Arbitrator may not decide any question other than eligibility. This argument overlooks the fact that Buckwalter had arbitrated eligibility and issued an award which provides full pensions for employees who had not yet reached age 65 but had 25 years or more of continuous service at time of termination and that a formula for payment be worked out by parties.

The Circuit Court of Appeals enforced Paragraph 1 of the Award. The District Court issued its order of December 7, 1964, which intends that differences or disputes "as to the interpretation and application and/or the method of enforcement, including the formula for payment" be decided.

Therefore, the Company position—that the Union's request for payment of pensions as of date of termination and the ingredients of the formula for payment are not arbitrable—is incorrect. To the contrary:

1. The Arbitrator's jurisdiction includes the issues involving "interpretation and application and/or the method of enforcement, including the formula for payment". And as the Supreme Court held in *Enterprise Wheel and Car Corporation,* arbitral

interpretation and application includes formulating remedies.

2. In any event, the crucial question, whether 25 years or more of continuous service alone qualifies employees for

pension, is a matter of eligibility, which admittedly is within the Arbitrator's jurisdiction.[1]

3. This question was decided by the Buckwalter Award.

(17)

IS AN EMPLOYEE WITH 25 YEARS OR MORE OF SERVICE ELIGIBLE FOR A FULL PENSION AT AT AGE 65 OR AT TIME OF TERMINATION.

Buckwalter opens his discussion of pensions as follows:

> "The Demand for Arbitration with respect to pensions reads: 'The Union grieves that the Company has misinterpreted and misapplied Article XX of the Agreement insofar as the Eligibility for pensions of the employees affected by the Company's movement to Danville, Virginia is concerned.' "

The grievance requested pensions for all the employees who were displaced by the Danville move. These employees were divided into three groups: those who had twenty-five years of service but were not age 65; those who were 65 years of age but did not have 25 years of service; and thirdly, employees who had neither age nor service to meet the express provisions of the contract.

---

1. Should it be decided in the courts that this question is a matter of formula for payment of the Award rather than eligibility (contrary to this Arbitrator's conclusion) the issue would have to be decided by the Arbitrator. In doing so he would be entering the situation after an award had been issued and would be deciding a formula for payment of that Award. In this role the Arbitrator decides that the payment of the pension per Section XX-D should begin immediately after termination. For this conclusion is most consistent with the spirit and logical structure of the Buckwalter Award, and is the most consistent with the Disston practices.

Paragraph 1 of the Award reads in part as follows:

"Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

"The formula for payment to be worked out by H. K. Porter Company and the Union."

As written, the Award provides that the grievants shall be paid a full pension upon termination.

In making his award Buckwalter interpreted and applied Section XX-C in the circumstances of the case—the removal of a large part of the plant to Danville and the termination of the grievant's employment—to determine which of the three groups claimants, if any, were eligible for pension payments.

(17)

Section XX, Pensions, Sub-Section C, Eligibility, reads as follows:

"Basic yearly pension allowance (without Social Security) which shall be paid a retired employe who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company, shall depend upon two conditions:

"1. Number of years of continuous service the employe has with the Company. The length of continuous service of an employe shall be computed from the date on which he first began to work....

"2. The amount of the employe's average regular earnings..."

Thus when Buckwalter held that employees who had not yet reached age 65 but who had completed 25 years or more of continuous service were eligible for pensions, he ruled that the pensions were payable upon termination. For Section XX-C is the only place in the contract that specifies when pension payments begin. Pensions, therefore, become payable upon achieving eligibility. Had Buckwalter intended a result different from the normal operation of Section XX-C as to when payments start, he would have said so—as he did with respect to eligibility. Thus the language of Paragraph 1 of Buckwalter's Award intends pensions to begin as of date of termination.

The same conclusion is reached by a comparison of Paragraphs 1 and 2 of the Buckwalter award. Paragraphs 1 and 2 alike provide pensions for each employee who met certain qualifications (in one case 25 years of continuous service and in the other age 65) at time of

(18)

termination. Obviously there can be no basis for delaying payment of pensions in Paragraph 2 because the employee has already reached age 65. Inasmuch as the Award does not distinguish between Paragraphs 1 and 2—between employees who are already 65 and those who are not—the Award shows that Buckwalter intended that pension payments for Paragraph 1 employees begin upon termination as they do for Paragraph 2 employees. Had Buckwalter intended otherwise, it would seem that he would have written in Paragraph 1 "shall be paid a full pension when he reaches 65 years of age", especially since he was interpreting the age 65 eligibility requirement as not being applicable to employees who found themselves in the circumstances of this case. Accordingly, the reasonable interpretation of the Award is that it means what it says—pensions begin upon termination.

Turning from the Buckwalter award, examination of his approach to the pension question and his evaluation of the practices, as described in his opinion, affirms this interpretation of his Award. He starts his decision of the pension issue (after citing the relevant contract provisions) with the principle:

> "It is well accepted that a pension is paid primarily because of years of service and not because an employee has attained a certain age."

He then turns to "the Law of the Shop", the actual practice followed in the Tacony Plant with respect to the determination of pension

(19)

eligibility, and discusses twenty of the 28 cases in evidence.

His first category is two cases where an arbitration award declared two men ineligible for pensions. In spite of this the Pension Board granted them pensions "because of the long period of total employment." His next category is five cases where the Pension Board increased pensions over the calculation because of long service. Another large category is seven cases where the men had less than 25 years' continuous service but were given pensions because of their long total service. He points to two cases in which men under age 65 were awarded pensions because of long service. He categorizes three cases where because of the curtailment of operations and their long total service pensions were increased until Social Security became effective. Then he cites the case of 46 year old Robert Kessler who was awarded a pension because of his close to 30 years' service and his physical disability. Concerning it, Buckwalter says:

"The Arbitrator directs attention to the fact the labor agreement in effect at that time provided for pensions for employees who had reached the age of 65 with at least 25 years of continuous service, and for employees who had 30 or more years of continuous service with the Company and who had reached the age of 60. Attention is directed to the fact that Kessler fell into neither of these categories . . . Although the Agreement then in effect contained no provision with respect to special consideration in cases of physical disability and hardship, nevertheless the Pension Board saw fit to give weight to his physical disability in arriving at its decision to grant him a pension."

He continues:

(20)

"... Examination of the decisions of the Pension Board over a span of several years clearly indicates that it was the practice of the Board to abide by the spirit, not the letter, of the eligibility clause. The Board followed a very humane and social approach in handling cases where there was doubt as to eligibility. In numerous instances where an employee had less than 25 years of continuous service a pension was granted because 'special consideration was given because of a long period of total employment.' Instances were cited of pensions being granted where the workers (Snyder and Bamford) had not met the age requirement but had long total service (44 years and 41 years). The Personnel Director, Mr. Norton, testified that breaks in service caused by the 1930 depression were generally not construed as breaks. In several instances the closing of a shop or the curtailment of the operations of a shop was a factor influencing the decision of

the Pension Board. In one instance a pension was given because of a physical disability, to an employee who was only 46 years of age. This was done in spite of the fact that the labor agreement made no provision for a pension because of physical disability.

"The fact that the Pension Board granted pensions to 2 employees who had been declared ineligible by an arbitrator seems to clearly indicate a practice of broad and understanding application of the eligibility requirements.

"It is the view of the Arbitrator that the various cases cited above, as well as others set forth in the transcript, clearly indicates the Pension Board applied a broad, rather than a narrow, concept of eligibility. . . .

"The essence of the Union's position with respect to pensions is: (1) failure of numerous workers to qualify under the eligibility provision of Section XX, because of the move to Danville, will inflict upon those terminated employees a severe and permanent economic loss; (2) the past practice over several years has been, in numerous exceptional or hardship cases, such as the instant case, to relax the precise written eligibility requirement.

"The request of the Union for pensions for those who, at the time of their termination because of the Danville move, had completed 25 years of service but were not 65, and for pro-rata pensions for those who were 65, but had

(21)

not completed 25 years of service, seems entirely reasonable and in line with earlier decisions of the Pension Board. Surely if breaks in service during the de-

pression of 1930 were overlooked, and surely if in 1954, a worker with 21½ years was given a pension because of the closing of the File Company, it would not be violating past practice in this plant for the Arbitrator to grant the Union's request. Nor would the Arbitrator be adding to the collective bargaining agreement since he would not be going beyond past practice with respect to the interpretation of eligibility for pensions."

Thus in the practice Buckwalter saw years of service as being the source of pensions; he saw numerous instances where pensions were granted employees with less than 25 years' continuous service; instances where pensions were granted employees who did not meet the age requirements; and several instances where exceptions to the express provisions of the plan had been influenced by major depression or curtailment of plant operations. He concluded that this is a hardship case and so the past practice would dictate a relaxation of the eligibility requirements.

He found authority in these practices of interpreting the eligibility provision to award full pensions to men with 25 years of service irrespective of how young they might be, and to award partial pensions to men 65 with lesser years of service in proportion to their years of service. Because there was no practice he denied pensions to those who had neither the service nor the age, and also severance pay, although he "strongly suggested" that the parties make an effort to arrive at an agreement for severance pay.

Thus Buckwalter's analysis of the practices and the "law of

(22)

the shop" concept upon which it was based makes clear that he intended his Award to provide for payment of a

full pension to Group 1 employees upon termination. This practice provided that the pensions begin at time of retirement. By analogy, in this case, at the time of termination.

Discarding the 60/30 early retirements under the Disston contract, three instances were cited to Buckwalter of pension payments beginning before age 60: Thomas Bamford, age 58; Robert Kessler, age 46; and George Ashcroft, age 54.[1] In none of these instances was the payment of pensions delayed until the applicants met the express age requirment instead of payments beginning upon approval of their applications.

In short, in light of Buckwalter's view that "the past practice . . . has been, in numerous exceptional or hardship cases, such as the instant case, to relax the precise written eligibility requirement", and in view of the fact that the only practices with respect to under age employees was to start payment of pensions immediately rather than waiting to age 65, it seems apparent that Buckwalter intended what he wrote—that pensions start at the time of termination.

Turning from Buckwalter's analysis of past practice, examination of the transcript and briefs submitted to Buckwalter also affirm

(23)

the conclusion that he intended his Award to apply as he wrote it—for payment to start at the time of termination.

---

1. The Company points out in a footnote in its brief (p. 15) that Kessler and Ashcraft were physical disability cases, which occurred prior to 1957, since when the parties have provided for such hardship cases in Section XX-J. But Buckwalter knew this when he evaluated the practices. His award was based on the Disston practices and his conclusion that they were binding on Porter, which finding was upheld by the courts.

The question of when the pension payments should start was raised several times by the Union.

On page 6 of his opinion Buckwalter reports the Union position as follows:

> "8. With respect to pensions there are 3 groups:
>
> "a. Those terminated employees who have rendered twenty-five years or more of service but had not yet reached age sixty-five at the time of termination. (Union Brief, page 52) Pensions as a fringe benefit, are negotiated payments for service, i.e., for years of service. Pensions are not paid because an employee has reached a certain age. For the Company to emphasize 'age sixty-five' is to unjustly withhold from an employee his pension which he has earned. (Union Brief, pages 56-57) This group is entitled to *full pensions.*
>
> "b. Those terminated employees who were sixty-five years of age but had not yet put in twenty-five years of service at the time of termination. Since Porter has made it impossible for these aged employees to continue to work it should not be allowed to profit by its unilateral action in severing these workers.
>
> "An equitable pension plan could be worked out on a pro rata basis between the Company and the Union. If the parties failed to reach an agreement then the arbitrator could prescribe an equitable formula. (Union Brief pages 57, 58)" Original underscoring)

On page 58-9 the Union argues that Group 1 employees are entitled to full pensions for these employees have put in their 25 years of service and their pensions are contracted for and are a binding obligation on the Company. The Union continues:

(24)

> " . . . If Porter insists on requiring any person in Group 1 to whom a full pension is awarded to wait until age 65 as a prerequisite to the start of the monthly pension payment to such terminated employees in Group 1, then such employee would wait rather than be deprived of pension; however, Porter could very well afford to grant pensions immediately to the terminated employees in Group 1. And if Porter further insists on working out a formula as to the amount of monthly pensions for those employees for the period of time before any such employees become age 65 with full pensions becoming payable as soon as age 65 is reached, then that could be worked out—Porter and the Union may even be able to agree upon the payment of a lump sum approach. Arbitrator Buckwalter should not hesitate to award pensions to any and all groups merely because a formula for payment may have to be worked out either by Porter and the Union or by Arbitrator Buckwalter if there is a disagreement thereon between Porter and the Union."

Thus Buckwalter had the issue of when full pensions are payable to Group 1 employees sharply presented by the Union: immediately for "Porter could very well afford to grant pensions immediately to the terminated employees in Group 1"; or "If Porter insists on requiring any person in Group 1 to whom a full pension is awarded to wait until age 65 . . . , then such employee would wait rather than be deprived of pensions".[1] Therefore, it is not reasonable to

1. It may be the Union would have settled its claims for less. The Arbitrator's function in this matter, however, is not to determine what Buckwalter might have done but to determine what he did do.

conclude that when Buckwalter ruled—that an employee "who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension"—he intended such employees to wait to age 65. Since the issue was so clearly drawn by the Union, he was obliged to

(25)

rule that the grievants shall be paid a full pension at age 65 had he so intended.

In short, Buckwalter granted the Union demand which asked no delay. He wrote: "The request of the Union for pensions for those who, at the time of their termination because of the Danville move, had completed 25 years of service but were not 65, and for pro rata pensions for those who were 65, but had not completed 25 years of service, seems entirely reasonable and in line with earlier decisions of the Pension Board." As pointed previously, inasmuch as he does not distinguish between the two groups and since there is obviously no basis for delaying payment of pensions for the latter employees because they had already reached age 65, pension payments also begin upon termination for the former group.

The arguments which the Company advances against the foregoing considerations do not stand up. As to the first argument, the Company points out that in August 1959 the Union requested that: "All employees who have 25 years of service or better and whose jobs are being discontinued due to their departments being moved to Danville, shall receive a pension *when they reach age 65* in accordance with the present Pension Plan." (Company emphasis) The Company continues that there can be no plainer recognition on the Union's part that pensions should not be payable until the retired employee attains age 65.

Dispositive of the Company argument is the fact that it is citing a part of a counter-proposal to a Company proposal for severance

(26)

involving severance pay and pensions.
pay. The Union knew the Company's position on pensions was that only terminated employees who met the express terms of the plan would receive pensions. And the Union sought to work out a compromise involving severance pay and pensions.

A counter-proposal is an effort to persuade rather than to assert a right or interpret a contract. As such it does not have decisive value in determining the Union's evaluation of its rights and Buckwalter's intent. In fact, in dealing with severance pay in his opinion Buckwalter begins:

> "SEVERANCE PAY
>
> "On page 123 of the transcript of the hearing the Union states: 'If the Arbitrator is of the opinion that a proposal once made and a counterproposal made in reply thereto fall by the wayside where no agreement is reached, then our position is that pensions are one thing, severance pay is another.' "

In relying on the express terms of the Agreement the Company repeats the argument which it made before Buckwalter and the courts, contending that an interpretation of the Award to provide for pension payments before age 65 is a deviation from the express terms of the Agreement. The courts decided this question. It ruled that Buckwalter acted entirely within his competence in evaluating the pension practices and relying on the "law of the shop".

The Company is also not persuasive when it argues alternatively that there is not a well documented practice in support of immediate payment of pensions to underage employees. Buckwalter wrote that pensions were paid for years of service; and more specifically, in the only cases

(27)

in evidence before him of approval of pension applications from underage employees, pension payments began immediately. Unlike the ruling in Paragraph 2 of Buckwalter's Award, where the granting of pensions to employees with less than 25 years of service was not supported by a single instance of past practice, here there are three cases of pension payments to employees under the express age requirement. And each instance represents a considered judgment. For as Company witness David W. Singley testified before Buckwalter, in the administration of the pension plan "factors were weighed and evaluated seriously before such deviations [from the contract] were granted."[1]

Accordingly, the Company's general proposition that a few instances do not establish a practice is not applicable to a pension plan. Not only does each deviation from the plan represent a careful judgment but also a basic consideration in pension plan administration, both within the Bureau of Internal Revenue and without, is that the plan not be discriminatory. Thus if the administrator of the plan knowingly grants pensions to an applicant not entitled under the plan, all similarly situated employees at the least are entitled to assert a claim for like treatment, on a nondiscriminatory basis. In short, one or two instances may, in given circumstances, establish a practice or amendment in pension plan administration—especially in a plan in

1. Transcript of December 22, 1961 hearing, p. 198.

which pensions are paid on a current expense basis. Therefore, to hold that the grievants with 25 years or more of continuous service must wait until age 65 before payment of a full pension

(28)

begins is to interpret Paragraph 1 of Buckwalter's Award inconsistently with the practices.

GRIEVANTS DECEASED BEFORE AGE 65

In Paragraph 1 of the Award Arbitrator Buckwalter ruled that: "Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

Section XIX-A provides in part that: "The Company will provide to all employees covered by this Agreement . . . a $2,500 non-contributory Life Insurance policy until retirement date; and on the First of the month following the employee's *pensioned retirement,* a $1,000 non-contributory Life Insurance policy *while on pensioned retirement* . . ." (Company emphasis.)

The Company argues that it is apparent from the above language that the contract contemplated that a retired employee would get the benefit of a $1,000 non-contributory policy promptly after he went on "pensioned retirement"; that pensioned retirement means simply, when the employee is receiving pension payments; that since the employee's pension is not payable until age 65, he does not qualify for the life insurance policy until he reaches age 65; that moreover Section XIX-B provides that an employee" . . . *being laid-off for any reason,* or having quit, is removed from insurance on the midnight of the employe's date of termination of employment (usually the last day worked)." (Company emphasis.)

The Company's position is not convincing for the same reasons

(29)

set forth in the preceding section of the opinion. It was found there that Buckwalter decided in Paragraph 1 of his Award that employees who had completed 25 years or more of service upon termination but who had not yet reached age 65 shall be paid a full pension beginning as of the date of termination. Thus for these employees "pensioned retirement" begins upon termination. Therefore, on the first of the month following their termination, these employees qualified under Section XIX-A for a $1,000 noncontributory life insurance policy for the duration of their pensioned retirement.

It also follows from the foregoing that the estates of Group 1 employees who have died since their termination are entitled to the monthly pensions from time of their termination until their death. For these employees had completed 25 years of continuous service as of date of termination and their pensions are payable as of that date under Paragraph 1 of the Award.

WHAT IS A "FULL PENSION"

The Company argues that if a pension allowance is found to begin before age 65, it must be actuarily reduced or else the grievants will receive more than other employees under the pension plan. It maintains that the only way the pension allowance can be kept within the four corners of the contract, if payable before age 65, is to determine actuarily the allowance payable from age 65 to death and reduce the payments proportionately to the lower starting age.

The fault with this argument is that Buckwalter ruled

(30)

that Group 1 employees, those who had completed 25 years or more of service at the time of their termination but had not yet reached age 65, qualified for full pensions. Looking to the practices, he did not find in the circumstances of the case—the removal of most of the plant to Danville and the consequent termination of employment of these employees —a compelling consideration in the fact that they did not meet the age eligibility requirement.

To the contrary, as pointed out previously, he found "entirely reasonable", the Union request for full pensions for Group 1 employees and for pro-rata pensions for Group 2 employees, those who were 65 at time of termination but had not yet completed 25 years of continuous service. "Nor", he continued, "would the Arbitrator be adding to the collective bargaining agreement since he would not be going beyond past practice with respect to the interpretation of eligibility for pension." Buckwalter accordingly held that Group 1 employees, as contrasted with Group 2 employees to whom he awarded pro-rata pensions, were eligible for full pensions.

The absence of any reference to actuarial reduction in Paragraph 1 of the Award or in the opinion is all the more significant in view of the fact that the Union mentioned this possibility. In the Conclusion of its Brief (p. 60) the Union pointed out that three rulings were possible insofar as Group 1 employees were concerned: they "may now be granted their full pensions at once or required to wait until age 65 is reached or now be paid a lesser pension (actuarily

(31)

ascertained) until reaching age 65, at which time the full pension would be paid". The Union urged the first alternative upon Buckwalter as follows: "Porter should not insist

upon delaying the payment of the full pension and Arbitrator Buckwalter should so award . . .".

Buckwalter accepted the Union position. He awarded Group 1 employees full pensions as contrasted with pro-rata pensions for Group 2 employees. He did not award actuarily reduced pensions. As the Union emphasizes in this proceeding, there is no practice—not one instance—of actuarial reduction. Thus the Buckwalter Award of full pensions was based on the practices; and to interpret it to provide for actuarily reduced pensions is to deviate from Buckwalter's Award.

It is not this Arbitrator's function to decide *why* Buckwalter reached the conclusion which he did on this point. But it is easily conceivable (and even probable) that on this score he was giving the weight which he deemed appropriate to the Union's unjust enrichment" argument.

The Union contends that the language "full pension" of Paragraph 1 of Buckwalter's Award requires that the claimants be paid the amount yielded by the calculation in Subsection D plus the amount required to bring them to the minimum guaranteed pension of $135.00 ($150.00 in the Supplement Agreement, dated September 15, 1958). The pension allowance provided in Section XX is defined in Subsections D and E as follows:

(32)

> "D. AMOUNT. Pension allowance shall be computed by multiplying 1% of the average regular yearly earnings (as determined in paragraph XX C-2), by the number of years of continuous service up to the date of retirement under the eligibility provisions. This yearly allowance shall be paid to the retired employee semi-monthly, monthly or otherwise as the board may determine.

"E. *MINIMUM PENSION.* Should the formula in paragraph XX-D plus primary Government Old Age Pension (as exists now or is later amended) develop a pension of less than $135 per month, the Company shall add a sufficient amount to its portion of the monthly pension to bring the combined total of $135 per month. This additional pension payment by the Company shall only be made if the employe is sixty-five years of age or over with twenty-five or more years of service at the time of retirement. . . ."

The Union argues that Buckwalter found that age 65 was not essential to receiving a pension; that "full pension" includes the minimum guarantee as an integral part; that to deny minimum guaranteed pension on the ground that age 65 is required would constitute a violation of the Award.

Decisive against the Union claim is the fact that under the Disston contracts[1] and practices the minimum guarantee was not paid to

(33)

underage retirees. Morever the Union construction of the Award would require the Company to stand in the shoes of the Federal government and provide the grievants Social Security benefits. The Union concedes this result by its offer of a compromise solution, which would give the Company credit for primary Social Security benefits for the period prior to age 65.

Furthermore, the practices concerning early retirements were conflicting. There were three such cases in which retirement was caused by plant curtailment (Hermanowicz, Hutchinson and Dutcher). In these cases the Pension Board while not applying the minimum guarantee

1. Section 8 of the March 1, 1948 Agreement, as amended.—Pension Plan.

before age 65 granted increased pension benefits until they qualified for Social Security, at which time the pension amount was decreased. On the other hand five retirees, three who did not meet the 60/30 eligibility requirements (Bamford, Ashcraft and Kessler) and two who did not meet the 65/25 eligibility requirements (Alley and Synder), were not made up to the minimum guaranteed pension but received only the amount yielded by the calculation of Section XX-D. And in none of these cases does the evidence indicate that the men were given the minimum guaranteed pension when they reached age 65. The existence of some diversity in practice is perhaps the main reason why Buckwalter directed the parties to work out a formula for the application of the pension allowance provisions and practices.

Accordingly, "full pension" may not be read to require the payment of the minimum guarantee. As to a pension allowance greater than the calculation yielded by Section XX-D, this would be a matter of formula for payment. Under the early retirement provisions of previous contracts and under the practices early retirees received the calculation but not the minimum guarantee and in most cases did not

(34)

receive anything more. Hence the Arbitrator sees no reason in writing the formula for payment of full pensions to award more than the calculation. For Buckwalter's Award was based on the practices.

ELIGIBILITY OF 24-YEAR MEN

The Company contends ten of the grievants, with 24 years of continuous service at the time of termination, are ineligible for pensions. It says that the Union relies on a

past practice but that the past practice shows there was no deviation from the provisions of the collective bargaining agreement.

> Sections VI-A of the contract states in pertinent part: ". . . An employe's continuous plant service . . . shall be broken only in the case of:
>
> ". . . 3. One-year lapse since the date of termination of employment (usually last day worked); . . ."

The Company accordingly argues that under the contract an employee who was laid off continues to accumulate continuous service for purposes of pension eligibility for one year after termination; that the significant fact is that in each of the cases cited by the Union the employee did not become *eligible* for pension until he achieved the 25th year of continuous service; that applications for benefits prior to this date were turned down; that therefore the ten employees involved are ineligible under the Buckwalter award since the language of eligibility in the Award is precise:

> "Each employee who, at the time he was terminated, had completed twenty-five years or more of service but had not yet reached age sixty-five, shall be paid a full pension."

The Company concludes that Article VI-A pinpoints the time of termination to the last day worked; that Arbitrator Buckwalter cut

(35)

off eligibility at this specific point; that the ten employees do not meet this test.

The Company argument is not persuasive. For in the only reference in the Buckwalter opinion to this Subject the

Company, in explaining its *rights* under the contract, is reported as saying that men with 24 years of continuous service at the time termination would start to receive pensions within one year of layoff. Thus according to Buckwalter's summary of the Company position (p. 8),the Company stated:

> "Mr. Hydrick clearly explained the pension policy which was in effect in 1959 when he informed the Union that the Company would abide by the contract provisions but that it had no intention of altering the existing pension plan. Those who are on pension would continue to receive it, and those eligible for pension within one year of layoff would receive their pension."

Accordingly, Buckwalter would not have considered the eligibility of grievants with 24 years of continuous service at the time of termination to be at issue—except as to age. Like similarly situated past retirees, their pensions would start one year after the date of layoff.

Similarly, the Company brief in the pages cited by Buckwalter reads (at p. 34):

> "The important point is that under the Plan as set forth in the contract as interpreted by the Arbitrator, in order to be eligible for pension an employee must have had 25 years of continuous service *immediately preceding the date of retirement*, which is 65 years of age.

(36)

> "The Union made no claim with respect to people who attain both age 65 and 25 years of continuous service within the first year after layoff, because, in accordance with the contract, these people were retired on the date they met both eligibility requirements.

> "Applying the contract to each of the categories designated by the Union, it is quite clear that *one year after the date of layoff*, their continuous service was broken and they were ineligible for pensions." (Original emphasis)

Again, the men with 24 years' service at time of layoff are deemed eligible by the Company as to the continuous service qualification.

Thus the contract as interpreted and applied provided that employees who at the time of retirement had 24 years of continuous service were eligible as to the service requirement. Indeed this is not disputed. Buckwalter's Award is based on the plan as practiced. Accordingly, the Company contention that the Award requires 25 years of continuous service at the time of termination is not convincing. To adopt it would require finding that Buckwalter intended to amend the contract and the practice and to provide a more narrow interpretation of eligibility than the Pension Board—a conclusion plainly not consistent with his opinion and award.

INDIVIDUAL CASES

GEORGE HOLMES AND HENRY SHUTTLEWORTH.

The Company argues that its records indicate that these employees quit to take other employment; that neither they nor the Union questioned the accuracy of these personnel records until this proceeding; that this is one of the several instances where the Union

(37)

is attempting to rewrite the Buckwalter Award.

As in the question of the eligibility of the 24-year service men, the Company contends further that Arbitrator

Buckwalter selected an exact cut-off date for determining eligibility—the date of "termination" of employment; that this term has its origin and definition in the contract, termination being defined as "usually the last day worked and occurs upon layoff; that this is in sharp distinction to a "voluntary quitting" as described in the contract (Section VI-A-2); that presumably, had Buckwalter intended to include Holmes and Shuttleworth as eligible employees, he would have done so; that accordingly, they do not come within the terms of his Award.

The Union points out that Holmes was age 49 as of September, 1959 and had 32 years of service; that Holmes testified without contradiction that Dickson (Holmes' foreman), Dickel Holmes' superintendent) and Harbison (personnel) advised Holmes to take his vacation and try the job at Nesbitt's; that after Holmes returned from vacation to Disston the three men told Holmes we are going to close; we advise you to take this other job; that Holmes said he didn't want to lose any benefits; that they said; No, you are not really quitting; go back and we will keep in touch with you; that he never did quit. The Union concludes that since Holmes' job was doomed and he was assured by the three men that he was not jeopardizing his rights, his grievance should be granted.

As to Henry Shuttleworth, the Union says that he had more

(38)

than 25 years of service as of September, 1959; that he was working in the Hacksaw Hardening Department; that on July 23, 1959 it was listed as a Department to be terminated. Therefore, the Union says that his Department and his job was terminated before he left the Company to

take another job and that he cannot really be considered as a quit.

Although the personnel records show both men as quits, the fact is both were told that their jobs would be terminated shortly. Leaving the Company under these circumstances is not quitting, for the moving cause is the Company's notice that the job is being terminated. Moreover, Holmes was advised to take the other job and his departure was authorized. These employees are therefore eligible for full pensions under Paragraph 1 of the Buckwalter Award.

HOWARD NORCROSS AND JOHN AFFATATO

Norcross and Affatato were terminated in November, 1959. They were recalled in September, 1960 but refused to return. Accordingly, the Company contends they are quits and so not included in the Award.

The Union says that the jobs would have lasted only two weeks; that the Company was very lenient in connection with recalls to temporary vacancies where the recalled employees had other jobs and would grant them extensions. The Company points out that Cantz, who accepted the recall, is still employed in this department.

The Union is not convincing. The procedure with respect

(39)

to extension of time when recalled involved, according to Union testimony, requesting an extension. There is no evidence that either Norcross or Affatato requested the Company to grant extensions. Accordingly, their failure to return was unauthorized, and so they must be considered quits pursuants to Section VI-A of the Agreement. Their grievances are denied.

FUNDING AND JOINT ADMINISTRATION

These are demands of the Union included as part of the formula for payment of the full pension. The Union argues that these are necessary for the effectuation of the payment of the pensions. But there is no authority in either the contract or the practices for making such an award.

In the alternative to these demands the Union asks for lump sum payment of the pensions. This demand is denied for similar reasons.

INTEREST

The Company's position on interest is based on its contention that pensions are not payable to the grievants under the Buckwalter award until they reach age 65. It argues that several eligible employees have attained such age since the termination of their employment and that the Company has indicated its readiness to pay pensions to such men; that the Union had not accepted the offer pending the resolution of their request for payments to commence as of termination; that in this background the Union's claim for interest is without merit.

(40)

The Union asks for four percent interest on the monies due the grievants from date of termination to their payment. The Union argues that the grievants are entitled to the interest inasmuch as the Company has had possession and use of their money. The four percent figure is selected because this is the figure commonly used in insurance computations.

In order to make the grievants whole for withholding of pensions they must receive interest as well as principal. The fact that pensions are involved and the length of time involved in their foregoing of them distinguishes this case and makes the remedy appropriate.

AWARD

1. Grievants who at time of termination had completed 25 years of continuous service are not required to wait to age 25 for pension payments under the Buckwalter Award. The Company shall pay them full pensions effective as of the time of their termination.

2. In accordance with the Buckwalter Award, the pension allowance specified in Paragraph 1 and subsequent paragraphs of this Award shall be calculated under Section XX-D of the September 16, 1957 contract, as extended September 15, 1958, without actuarial reduction. The Union request for the application of the minimum guaranteed pension for the grievants is denied.

3. The Company shall pay the grievants the total of the past due pension payments as a lump sum, calculated with the addition

(41)

of four percent interest, retroactively to the date of their termination.

4. Grievants who at time of termination had completed 25 years of continuous service but have since died before reaching age 65 were eligible under the Buckwalter Award for pension payments at time of termination. The Company shall pay their estates the sum of the full monthly pension payments from the time of their termination to their death.

5. Grievants who at the time of termination had completed 24 years of continuous service are eligible under the Buckwalter Award to receive full pension payments upon

the completion of their 25th year of continuous service. The Company shall pay them full pensions effective as of the completion of their 25th year of continued service.

6. George Holmes and Henry Shuttleworth were terminated employees rather than quits and are therefore eligible under Paragraph 1 of the Buckwalter Award. The Company shall pay them full pensions effective as of time of termination.

7. The grievants who are eligible for pensions under the Buckwalter Award also qualify for a $1,000 non-contributory life insurance policy as of the first of the month following their becoming eligible for pension payments and for the duration of their pensioned retirement. The Company shall pay the estates of deceased grievants the benefits due under the life insurance policy.

8. Howard Norcross and John Affatato were vountary quits

(42)

rather than terminated employees. They are therefore not eligible for pensions under Paragraph 1 of the Buckwalter Award.

9. The Union request for funding and joint administration of the pension plan is denied.

DONALD A. CRAWFORD
Arbitrator

DATE: Ardmore, Penna.
April 15, 1967

APPENDIX H

Opinion of United States District Court for the Eastern District of Pennsylvania, 283 F. Supp. 739 (1968)

MEMORANDUM AND ORDER—U.S. DISTRICT COURT—4/4/68

JOHN W. LORD, JR., J. APRIL 4, 1968

This is a labor arbitration matter.

Shortly after the plaintiff, H. K. Porter Company, Inc. ("Porter"), announced its intention to move a large portion of its operations from its Philadelphia plant to Danville, Virginia, the defendant, United Saw, File and Steel Products Workers of America, Federal Labor Union No. 22254, AFL-CIO ("Union"), filed certain grievances claiming pension rights and severance pay. Porter objected to the *arbitrability* of these grievances but was finally directed by this Court on April 11, 1961 to submit the disputes to arbitration.[1] *United Saw Workers v. H. K. Porter Co.*, 190 F. Supp. 407 (E.D. Pa. 1960).

Thereafter, W. Roy Buckwalter was selected as the arbitrator, hearings were held, and an award was made on August 17, 1962 stating:

---

1. Porter was directed to:

"... conform and comply with Sections III and IV of the Collective Bargaining Agreement between itself and the plaintiff, to select an Impartial Chairman and to submit to arbitration, *subject to the provisions of the Collective Bargaining Agreement*, the grievances with respect to pensions and severance pay *insofar as such grievances arise under the provisions of the Collective Bargaining Agreement* and constitute claimed violations thereof. ..." (Emphasis added.)

"*Pensions: The Arbitrator rules that:*

"1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

"The formula for payment to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"3. The request for pensions for employees who, at their termination, had not yet reached age sixty-five and who had not put in twenty-five years of service is denied.

"The Union's request for severance pay is denied."

Porter sought to have this award vacated, but this Court granted enforcement of Parts 1 and 2 on May 10, 1963. *H. K. Porter Co., Inc. v. United Saw Workers*, 217 F. Supp. 161 (E.D. Pa. 1963). This decision was appealed and affirmed by the Court of Appeals for the Third Circuit insofar as it enforced Part 1 of the Buckwalter Award, but reversed as to Part 2. *H. K. Porter Co. v. United Saw Workers*, 333 F. 2d 596 (3rd Cir. 1964).

The case was then remanded to this Court with instructions to enter appropriate judgment. On December 7, 1964, pursuant to the remand, this Court entered an Order and Judgment *drafted by both parties* which provided in part:

> 4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relations Act of 1947. *In the event differences or disputes arise between the parties* as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award as quoted above, then either party shall apply *to this Court* under the above caption for such action as it deems appropriate. (Emphasis added.) *H. K. Porter Company, Inc. v. United Saw Workers*, Civil No. 32367 (E.D. Pa., filed December 7, 1964).

The parties could not then agree as to the interpretation and application of Part of the Buckwalter Award. Yet, there was *no application to this Court* as provided for by paragraph 4 of the above-mentioned Order and Judgment. Rather, counsel agreed to further arbitration before a new arbitrator, Donald A. Crawford. Hearings were held in 1965 and in 1967 Arbitrator Crawford issued the following award:

> "1. Grievants who at time of termination had completed 25 years of continuous service are not required to wait to age 65 for pension payments under the Buckwalter Award. The Company shall pay them full pensions effective as of the time of their termination.
>
> "2. In accordance with the Buckwalter Award, the pension allowance specified in Paragraph 1 and subsequent paragraphs of this Award shall be calculated

under Section XX-D of the September 16, 1957 contract, as extended September 15, 1958, without actuarial reduction. The Union request for the application of the minimum guaranteed pension for the grievants is denied.

"3. The Company shall pay the grievants the total of the past due pension payments as a lump sum, calculated with the addition of four percent interest retroactively to the date of their termination.

"4. Grievants who at time of termination had completed 25 years of continuous service but have since died before reaching age 65 were eligible under the Buckwalter Award for pension payments at time of termination. The Company shall pay their estates the sum of the full monthly pension payments from time of their termination to their death.

"5. Grievants who at the time of termination had completed 24 years of continuous service are eligible under the Buckwalter Award to receive full pension payments upon the completion of their 25th year of continuous service. The Company shall pay them full pensions effective as of the completion of their 25th year of continuous service.

"6. George Holmes and Henry Shuttleworth were terminated employees rather than quits and are therefore eligible under Paragraph 1 of the Buckwalter Award. The Company shall pay them full pensions effective as of time of termination.

"7. The grievants who are eligible for pensions under the Buckwalter Award also qualify for a $1,000 non-contributory life insurance policy as of the first of the month following their becoming eligible for pension payments and for the duration of their pensioned

retirement. The Company shall pay the estates of deceased grievants the benefits due under the life insurance policy.

"8. Howard Norcross and John Affatato were voluntary quits rather than terminated employees. They are therefore not eligible for pensions under Paragraph 1 of the Buckwalter Award.

"9. The Union request for funding and joint administration of the pension plan is denied."

Plaintiff, Porter, on May 26, 1967 moved to vacate certain portions of the Crawford Award. Defendant, Union, filed an answer and a cross-motion to enforce the award. It is on these motions that the matter is presently before this Court.

Section XX-B of the collective bargaining agreement between the parties in this case expressly limits the authority of an arbitrator in matters involving pensions to problems of *eligibility*.[2] Under Section 301 of the Labor Management Relations Act this Court has the duty of determining whether a party agreed to arbitrate a particular grievance. Arbitration is a matter of contract; as such any agreement to arbitrate must be found in the arbitration clause of the collective bargaining agreement. The arbitration clause here expressly limits arbitration to the issue of eligibility. It is well established that an order to arbitrate should not be denied unless it may be said with *positive assurance that the arbitration clause is not susceptible of an interpretation* that covers the asserted dispute. This Court finds with that requisite positive assurance that sec-

2. Section XX-B of the collective bargaining agreement provides in part:

> Problems of eligibility within the terms of this pension plan . . . shall be the only pension problems subject to arbitration. . . .

tion XX-B of the contract precisely limits pension grievance arbitration to eligibility and that the *time and method of payment* of pension benefits is not an arbitrable problem of eligibility.

Defendant, Union, argues that the Order and Judgment of this Court of December 7, 1964 in effect authorized Arbitrator Crawford to rule on the time and method of payment of the pensions. This is not so. In the event of dispute as to the interpretation of the Buckwalter Award, including formula for payment, the parties were to apply to this Court. While the parties could have agreed voluntarily to subject formula for payment to arbitration as well as eligibility, there has been no showing that this was done. Porter's submission to the arbitration did not constitute such an agreement. See *Local 719, Bakery Workers v. National Biscuit Co.*, 378 F. 2d 918 (3rd Cir. 1967). The Order and Judgment of December 7, 1964 in no way enlarges the scope of authority given to an Arbitrator by XX-B of the collective bargaining agreement. Under this Order and Judgment, this Court is the proper forum in which to decide disputes as to time and method of payment. Therefore, in view of the above, the Court makes the following ruling:

Paragraph 1 of the Crawford Award is vacated in its entirety. The arbitrator exceeded his authority in ruling on "time of payment." This dispute was only adjustible by the parties or, of course, by this Court under its Order and Judgment. As such, I hold that grievants who at the time of termination had completed 25 years of continuous service are required to wait until age 65 for pension payments.

Paragraph 2 is upheld only insofar as it denies the Union request for the application of the minimum guaranteed pension for the grievants. Calculation of the benefits "without actuarial reduction" pertains to "method of pay-

ment" and as such was not a proper subject for arbitration.

Paragraph 3, likewise, goes to method of payment and is thus vacated as it is outside the scope of arbitration.

Paragraph 4 must be vacated in its entirety. Again, the Arbitrator exceeded his authority in ruling on time for payment. Since, I have ruled that payments should commence at the age of 65 and since section 20.50 of the collective bargaining agreement provides that pension payments "shall cease at the death of the employee," an employee dying before his 65th birthday would forfeit his pension rights; nor would the estate of the decedent qualify for any of the payments.

Paragraph 5 is vacated in its entirely. While, the granting of pension benefits to grievants with only 24 years of service certainly goes to eligibility, it flies in the face of the Court of Appeals ruling that the 25 years of service requirement could not be dispensed with.[3] The Buckwalter Award as enforced by this Court specifically requires 25 years of service.

Paragraph 6 is vacated insofar as it directs that Holmes and Shuttleworth should be paid full pensions prior to the time that each attains sixty-five years of age. In no case should any payments be made to any grievant prior to the time he reaches the age of 65.

Paragraph 7 will be enforced insofar as it pertains to eligibility. Thus, each employee who, at the time he was terminated, had completed twenty-five years or more of

---

3. The Court of Appeals in *H. K. Porter Co. v. United Saw Workers,* 333 F. 2d 596 (3rd Cir. 1964) ruled that while there was a basis in view of prior practice, of relaxing the 65 years of age requirement for employees with 25 years of continuous service, there was no such similar precedent for granting pensions, even pro rata, to employees who had reached 65 without serving 25 years. The 25 years of service requirement could not be relaxed.

service, but had not yet reached age sixty-five qualifies for a $1,000 non-contributory life insurance policy as of the first of the month following his becoming eligible for pension payments, i.e. at the time he reaches the age of 65. Obviously, since a grievant doesn't qualify for the life insurance until he reaches his sixty-fifth birthday, if he dies before such date he cannot receive such a policy. Thus, that part of paragraph 7 pertaining to the payment of benefits under said policies to the estates of grievants who died prior to attaining sixty-five years of age is vacated.

Paragraph 8 will be enforced as it pertains solely to eligibility.

Paragraph 9 will be enforced.

ORDER

AND NOW, to wit, this 4th day of April, A. D. 1968, it is ORDERED that the arbitration award of April 15, 1967 be and the same is hereby VACATED as to the following:

Paragraph 1 in its entirety.

Paragraph 2 insofar as it pertains to calculation of payment.

Paragraph 3 in its entirety.

Paragraph 4 in its entirety.

Paragraph 5 in its entirety.

Paragraph 6 insofar as it prescribes payment of pensions before the age of sixty-five.

Paragraph 7 insofar as it pertains to grievants deceased prior to their reaching the age of sixty-five.

All other portions of the award be and the same are hereby ENFORCED.

AND IT IS SO ORDERED.

JOHN W. LORD, Jr., J.

APPENDIX I

Opinion of the Court of Appeals for the Third Circuit,—F. 2d—(3d Cir., 1969)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 17283

H. K. PORTER COMPANY, INC.

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA FEDERAL LABOR UNION NO. 22254, AFL-CIO,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 21, 1968

BEFORE GANEY, FREEDMAN and SEITZ, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 10, 1969)

FREEDMAN, *Circuit Judge.*

This is an appeal by a labor union from the district court's vacation of portions of an arbitrator's award on the ground that they were beyond his authority.

The controversy has had a long history and was before us at an earlier stage.

In 1955 H. K. Porter Company, Inc., acquired the plant of Henry Disston & Sons, Inc., in Philadelphia, which it continued to operate as a Division until sometime in 1959 when it announced its intention to move a large part of its operations to Danville, Virginia. The union, which had a collective bargaining agreement with the company, filed grievance claims relating to pension rights and severance pay on behalf of the employees whose positions were terminated by the closing of the plant. These grievances were not settled and the union demanded arbitration which the company rejected on the ground that the dispute was not within the arbitration provisions of the collective bargaining agreement.[1] In an action by the union under § 301 of the Labor Management Relations Act (29 U.S.C. § 185), the district court held the issues arbitrable (United Saw,

1. Section III-A of the contract provides that "[s]hould differences arise between the Company and the Union . . . as to the meaning and application of the provisions of this Agreement, or should any grievance arise between the parties hereto, there shall be no stoppage of work, strike or lockout on account of such differences, but an earnest and sincere effort shall be made by the parties hereto to settle such differences . . ." in accordance with specified grievance procedures.

Sections III-B and IV-A provide that grievances not settled under these procedures can be appealed to an Impartial Chairman chosen by mutual agreement of the parties.

Section XX-B, establishing a pension committee comprised of management and union representatives, provides: "Problems of eligibility, within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration. . . ."

File and Steel Products Workers v. H. K. Porter Co., 190 F.Supp. 407 (E.D.Pa. 1960)) and ordered the company to submit to arbitration "subject to the provisions of the Collective Bargaining Agreement, the grievances with respect to pensions and severance pay insofar as such grievances arise under the provisions of the Collective Bargaining agreement. . . ."[2]

Following this order the parties chose W. Roy Buckwalter as the impartial arbitrator. On August 17, 1962, Buckwalter issued an award rejecting the union's claim for severance pay and ruling in favor of the company on some pension items and in favor of the union on others. The district court ordered enforcement of the award after the company attacked it and the union counterclaimed for its enforcement. H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers, 217 F.Supp, 161 (E.D.Pa. 1963).

On appeal we held that the arbitrator was not limited exclusively to the provisions of the collective bargaining agreement but was entitled to consider also the pension practices which the parties had followed under the pension plan and that this justified paragraph 1 of Buckwalter's award which held:

"1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

"The formula for payment to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 noncontributory life insurance policy. . . ."

We also held, however, that neither the language of the agreement nor the practice of the parties justified paragraph 2 of the award which held:

---

2. The district court entered its definitive order on April 11, 1961, after an appeal in which we settled the form of order.

"2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out" by the parties and shall also receive a $1,000 non-contributory life insurance policy.[3]

We therefore affirmed the judgment of the district court sustaining paragraph 1 of Buckwalter's award and reversed its judgment as to paragraph 2 of Buckwalter's award, and remanded with instructions to enter judgment in favor of the company on paragraph 2. H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers, 333 F.2d 596 (3 Cir. 1964).

3.

THE BUCKWALTER AWARD

"PENSIONS: *The Arbitrator rules that*

"1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

"The formula for payment to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

"Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

"3. The request for pensions for employees who, at their termination, had not yet reached age sixty-five and who had not put in twenty-five years of service is denied.

"SEVERANCE PAY:

"The Union's request for severance pay is denied."

On remand the parties submitted a form of judgment which they had jointly drafted and which the court approved and entered on December 7, 1964. It enforced paragraph 1 and vacated and declared void and unenforceable paragraph 2 of the Buckwalter award. Paragraph 4 of the judgment then provided:

> "4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award as quoted above, then either party shall apply to this Court under the above caption for such action as it deems appropriate."

The differences which then arose between the parties regarding paragraph 1 of the Buckwalter award were not brought to the district court as the judgment provided, but instead were submitted to a new arbitrator, Donald A. Crawford. There was no joint written or even oral specification of the issues to be arbitrated nor was there any express statement of the view of either party as to the scope of the arbitration at the time Crawford was selected. During the course of the hearings the company claimed that the only question for the arbitrator was the determination of the specific employees who were eligible for pensions under paragraph 1 of the Buckwalter award, and it objected to the decision of any problems beyond eligibility. The union on the other hand claimed that Crawford was to decide whatever differences had arisen between the parties regarding paragraph 1 of the Buckwalter award.

On January 21, 1966, after having heard the claims of the parties Crawford advised them it was his opinion that

employees under paragraph 1 of Buckwalter's award were not required to wait until they reached age sixty-five in order to receive their pensions. He believed that with this informal knowledge of his decision on the threshold issue the parties would be able to resolve the remaining issues. He therefore referred these issues back to the parties, retaining jurisdiction in the event they could not resolve them. When the parties later informed him that they were unable to resolve their differences he conducted a further hearing and then filed his award.

Crawford's award, in addition to dealing with certain specified employees in paragraphs 6 and 8 which we here omit, declared in effect:

1. Employees who had served for twenty-five years were entitled to payment of full pensions beginning on the date of termination of their employment, without waiting until they attained age sixty-five.

2. Pensions should be calculated without actuarial reduction, and the minimum guaranteed pension provision of the contract should not be applied.

3. The company should pay past due pension payments in a lump sum with four per cent interest retroactive to the date of termination of employment.

4. In the event of the death of an employee with twenty-five years of service before reaching age sixty-five, his estate would be entitled to full pension payments from the date of termination of his employment to the date of his death.

5. Employees with twenty-four years of service were entitled to pensions effective one year from the time of termination of their employment.

* * * *

7. Every employee eligible for pensions was also entitled to a $1,000 non-contributory life insurance policy as of the first of the month following his becoming eligible for pension, and in the event of his death the company should pay to his estate the benefits due under the policy.

* * * *

9. Funding and joint administration of the pension plan was not required.

The company moved to vacate portions of the Crawford award as outside the scope of his authority, contrary to the provisions of the collective bargaining agreement, and inconsistent with the prior decisions in the case. The union filed a cross-motion to enforce the award in full. The district court held that the collective bargaining agreement limited the arbitration of pension questions to eligibility and that this clearly did not include the time and method of payment of pension benefits. The court also held that while the issue of payments to men with twenty-four years of service was an arbitrable eligibility issue, the award could not be justified under our prior decision that the twenty-five years of service requirement was mandatory. The district court therefore vacated substantially all of the Crawford award, and ordered enforcement of its remaining provisions.[4] H. K. Porter Co., Inc. v. United Saw, File and Steel Products Workers, 283 F.Supp. 739 (E.D.Pa. 1968). It is from this order that the union has taken the present appeal.

---

4. It vacated paragraph 1 in its entirety; paragraph 2 in so far as it pertained to calculation of payment; paragraphs 3, 4 and 5 in their entirety; paragraph 6 in so far as it prescribed payment of pensions before the age of sixty-five; paragraph 7 in so far as it pertained to employees who had died before reaching age sixty-five.

The district court recognized that an exclusion from the arbitration clause of a collective bargaining agreement must clearly appear. It believed, however, that § XX-B of the agreement which provides that "[p]roblems of eligibility within the terms of this pension plan . . . shall be the only pension problems subject to arbitration . . .", limited the arbitration of any pension grievances to issues of eligibility, and that neither the agreement nor the subsequent conduct of the parties was enough to make arbitrable the issue of the time and method of payment of pension benefits.

Section XX-B must be construed in the context of the unanticipated supervening act of the company in closing the plant which made it impossible for some of the employees to continue in service until attaining the age of sixty-five. As the agreement had been written, in the normal course of events an employee who had served for twenty-five years but had not yet reached the age of sixty-five could continue in his employment until both conditions were fulfilled, and would thereupon be "eligible for pension". Such eligibility automatically carried with it the right to immediate pension payments and there was no distinction in time between eligibility for pension and payment of pension benefits.

Buckwalter, in awarding full pensions to employees who had served for twenty-five years but had not attained age sixty-five, held that they became eligible because the removal of the plant made impossible their continued service until they reached age sixty-five. Since the premature termination of their employment displaced the requirement that the employees must reach age sixty-five, the standard of eligibility was now altered and with it the time of accrual of the right to payment. The two questions, when an employee was entitled to pension and when the right to

payment of pension benefits accrued, are at least so interwoven in the circumstances of this case that we cannot say that § XX-B alone requires their elimination from the scope of arbitration.

Moreover, even if § XX-B were construed to exclude the time and method of payment of pensions, it is not alone enough to prevent recognition of the subsequent arrangements which the parties made.

The Buckwalter award in providing that the "formula for payment" should be worked out between the parties had created a new source of dispute between them. It was this dispute which the parties acknowledge would require judicial decision if it was not settled between themselves when they agreed to the form of judgment of December 7, 1966. When they failed to settle the dispute, instead of returning it to the court they submitted it to a fresh arbitration. The provision of the agreement, therefore, cannot be sterilized as if it were untouched by these events. Even if the dispute regarding the effectuation of Buckwalter's award were not a matter of eligibility which the company was required to arbitrate under § XX-B, nevertheless, it was one which the company had voluntarily brought within the realm of arbitration by agreeing to submit the dispute to Crawford. The resort to an arbitration unrestricted at the outset must be presumed to include the disputes which the parties declared would require resolution by the district court if they were unable to settle them between themselves. It would require an express limitation to exclude from the Crawford arbitration any of these disputes. None was expressed. Indeed, during the course of the arbitration the company acknowledged that in determining the scope of the submission Crawford was entitled to take into consideration the provisions of paragraph 4 of the

judgment.[5]

If the authority for Crawford's decision may not be found in the collective bargaining agreement, it was clearly authorized by the definition of the scope of their dispute in paragraph 4 of the judgment which the parties transmuted into an arbitration. Such an agreement is, of course, valid and enforceable. Cf. Anaconda Co. v. Smeltermen's Union,—F.2d—(9 Cir. 1968).

The circumstances, therefore, support Crawford's conclusion that the company had agreed to have him decide the dispute regarding the time and method of pension payments. The case is clearly distinguishable from Local 719, American Bakery and Confectionary Workers v. The National Biscuit Co., 378 F.2d 918 (3 Cir. 1967), where we held that the union's objection to arbitrability, which it had made at the very outset and continued to preserve throughout the process of arbitration proceeding. Here, instead of an objection at the outset of the arbitration, there was agreement and acquiescence to the arbitration. The company's brief filed with the arbitrator some months after the submission and hearings, in which it maintained that the time and method of payments was not arbitrable under § XX-B, cannot serve as a unilateral revocation of the agreement which

---

5. "THE ARBITRATOR: My jurisdiction then comes under this court order?

"MR. MADEIRA [Attorney for the company]: Your jurisdiction comes under all the documents.

"THE ARBITRATOR: Under all the documents, including this directive of the court, and at issue here is Paragraph 2; is that correct?

"MR. WILDERMAN [Attorney for the union]: When you say 'under this order,' you are referring to the order of December 7, 1964, Mr. Crawford?

"THE ARBITRATOR: Yes, Judge Lord's.

. . . . .

"MR. MADEIRA: My understanding is that that is correct, sir, that your jurisdiction come from all the documents, and we are particularly concerned with paragraph 2 of Union's Exhibit 1.

"MR. WILDERMAN: Which is the order of December 7, 1964."

both parties had made when they selected Crawford as their arbitrator.

If the company is now required to submit to an award which goes beyond the literal meaning of § XX-B, it is because the closing of the plant was an unanticipated event for which the agreement made no provision. The issues which followed from this and the dispute regarding the Buckwalter award were submitted to Crawford without limitation. Where the parties bring to an arbitrator the full range of their dispute and express no reservation in their submission, the broad doctrine which favors the arbitration of labor disputes[6] must be given full scope.

A final issue remains. The district court vacated paragraph 5 of Crawford's award that employees with twenty-four years of service were eligible for full pensions one year after the termination of their employment. This award was based on a provision in § VI-A of the agreement which for purposes of pension and other rights makes employment continuous for one year after service is terminated.[7]

The district court believed the award was contrary to our earlier decision setting aside paragraph 2 of Buckwalter's award of pro rata pensions to employees who, although they had reached age sixty-five, had not completed twenty-five years of service when their employment was terminated. However, in holding that twenty-five years of

6. See, e.g., John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co., 369 U.S. 95 (1962); U. S. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 693 (1960); U. S. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 674 (19693; U. S. Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960).

7. Section VI-A of the contract provides:

". . . An employe's continuous plant service . . . shall be broken only in the case of:

". . . 3. One year lapse since date of termination of employment (usually last day worked). . . ."

service was a mandatory requirement we did not deal nor were we presented with the subordinate problem whether employees who had worked for twenty-four years would satisfy the requirement if they added an additional one year of service under the provisions of § VI-A.

The company contends that paragraph 1 of Buckwalter's award declares in effect that only employees who had completed twenty-five years of service at the time their employment was terminated were entitled to pensions. This, it argues, is contradicted by Crawford's award permitting the one year following the termination of employment to be added to twenty-four years of service. Buckwalter, however, nowhere dealt with the effect of § VI-A on twenty-four year service employees. His decision regarding employees who did not need to rely on § VI-A to meet the twenty-five years service requirement does not control cases in which the effect of § VI-A is presented. Indeed, Buckwalter stated in his opinion that the company in explaining its pension policy had made it clear that the twenty-five year service requirement for pensions would be met by employees with twenty-four years of actual service and the additional one year extension under § VI-A.[8] It can hardly be said, therefore, that Buckwalter had decided in favor of the company an issue which had not been in dispute before him.

The judgment of the district court will be reversed with direction to enter judgment enforcing the Crawford award.

---

8. "Mr. Hydrick clearly explained the pension policy which was in effect in 1959 when he informed the Union that the Company would abide by the contract provisions but that it had no intention of altering the existing pension plan. Those who were on pension would continue to receive it and those eligible for pension within one year of lay-off would receive their pension.

"The Company has, without exception, followed this pension policy." Buckwalter Opinion, p. 8.

APPENDIX J

Excerpts From 1957 Collective Bargaining Agreement

Section IV—SENIORITY

A. PLANT SERVICE is defined as the length of an employe's continuous service with the Company and it shall apply to pensions, vacations, holidays, death leave and general plant recall. An employe's continuous plant service shall be computed from the date he or she first began work with the Henry Disston Division of H. K. Porter Company (Delaware) the Tacony Plant or its predecessor Henry Disston & Sons, Inc. (Tacony Plant) and shall be broken only in the case of:

1. Justifiable discharge; or
2. Voluntary quitting from any department; or
3. One year lapse since date of termination of employment (usually last day worked); or
4. The employe, after receipt by certified letter of notification to report for work in his department remains absent for more than five working days without due notification to the Company of intent to report for work (copy of such letter of notification to be sent to the Union); or
5. Failure of an Armed Forces serviceman, honorable discharged from such service, to apply for reinstatement within ninety days (Universal Military Training & Service Act) or sixty days (Reserve Forces Act of 1955) of discharge from service.

Section XIV—LIFE INSURANCE

A. The Company will provide to all employes covered by this Agreement, including the Union President and Union Secretary, effective on the day after completing one month of continuous service with the Company, a $2500. non-contributory Life Insurance policy until retirement date; and on the First of the month following the employe's pensioned retirement, a $1000. non-contributory Life Insurance policy while on pensioned retirement. However, if the pensioned employe has received Total or Permanent Disability Benefits and the amount of his remaining Life Insurance, if any, is less than $1000. when he goes on pensioned retirement, such lesser amount will be continued without change at no cost to the pensioned employe.

B. An employe, entering the Armed Forces, or being laid-off for any reason, or having quit, is removed from insurance on the midnight of the employe's date of *termination* of employment (usually his last day worked).

* * * *

G. The Life Insurance will remain in force for thirty-one days following the *termination* of his employment with the Company. Within this thirty-one day period, by making application to the Metropolitan Life Insurance Company, the employe may convert his group Life Insurance without medical examination to an individual Life Insurance policy upon one of the forms of policies except Term Insurance, then customarily issued by the Metropolitan for Life Insurance only, without Disability or Accidental Means Death Benefits, at the rate for his class of risk and age at that time. Such individual policy will not become effective until after the thirty-one day period has expired.

Section XX—PENSIONS

The Company agrees to continue pension payments as negotiated September 1, 1950, Feb. 4, 1952 and July 15, 1953 with its predecessor Henry Disston & Sons Inc. The Company will also provide for all employes covered by this Agreement the following Pension Plan:

A. The administration of this Pension Plan shall be in the charge of the Management General Pension Board, Henry Disston Division, H. K. Porter Company (Delaware) Hourly Employes Pension Plan.

B. *UNION MANAGEMENT PENSION COMMITEE.* A pension committee of three members from Management and three members from active Union Membership shall review eligibility problems and shall be furnished employment and earnings data on those employes who are due for retirement. Problems of eligibility within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration, the Company and the Union to share in equal part the expense of the Impartial Arbitrator in any such cases.

C. *ELIGIBILITY.* Basic yearly pension allowance (without Social Security) which shall be paid a retired employe who has reached the age of sixty-five with at least twenty-five years of continuous service with the Company, shall depend upon two conditions:

1. The number of years of continuous service the employe has with the Company. The length of continuous service of an employe shall be computed from the date on which he or she first began work. However, for each and every absence of over one year due to illness, the employe will be given credit for only one year in the calculation of the amount

of pension and the length of service. Such employes must furnish the Company with a Doctor's certificate every three months. If he takes another job, he will forfeit these benefits. Such length of continuous service shall only be broken in the case of:

a. Justifiable discharge.

b. Voluntary quitting.

c. The employe having been laid off for one year or more.

d. The employe, after receipt of notification to report for work by registered letter, remaining absent for more than five working days without due notification to the Company of intention to report for work. Copies of such notices shall be sent to the Union.

2. The amount of the employe's average regular yearly earnings, exclusive of overtime and shift premium for the last ten years of employment, and not including compensation for injury or sickness, whether awarded under workmens compensation or otherwise.

D. *AMOUNT.* Pension allowance shall be computed by multiplying ½% of the average regular yearly earnings (as determined in paragraph XX C-2), by the number of years of continuous service up to the date of retirement under the eligibility provisions. This yearly allowance shall be paid to the retired employe semi-monthly, monthly or otherwise as the board may determine.

E. *MINIMUM PENSION.* Should the formula in paragraph XX-D plus primary Government Old Age Pension (as exists now or is later amended) develop a pension of

less than $135. per month, the Company shall add a sufficient amount to its portion of the monthly pension to bring the combined total to $135. per month. This additional pension payment by the Company shall only be made if the employe is sixty-five years of age or over with twenty-five or more years of continuous service at the time of retirement. In order to obtain the $135. minimum pension, the eligible employe must furnish data from the Social Security Board stating the exact amount of his primary benefit upon retirement.

F. *PAYMENT.*

1. Pension allowance as determined in paragraph XX-E shall be payable on the regular semi-monthly or monthly paydays or otherwise and shall cease at the death of the employe.

2. Payment of pension allowances may, at the discretion of the Pension Board, be made to a member of the family or guardian for the benefit of the employe. Pension allowances shall be non-assignable, and an attempted transfer or pledge of the same shall not be recognized by the Pension Board, and may, in its discretion, work a forfeiture thereof.

3. Payments of pension allowances may be suspended or terminated by the Pension Board in cases of gross misconduct or of acts prejudicial or injurious to the Company's interest. Such cases may be referred to the Union-Management Pension Committee.

4. The acceptance of a pension allowance shall not debar any retired employe from engaging in any other business which in the judgment of the Pension

Board is not prejudicial to the interest of the Diston Division of H. K. Porter Company (Delaware) but such employes cannot re-enter the service of the Company without the consent of the Pension Board.

G. *HOW TO SECURE A PENSION ALLOWANCE.* An employe wishing to apply for a pension allowance should first take up the subject with the Superintendent or head of the department in which the employe is serving.

H. The Company agrees to provide for payment of vacation to all employes who are pensioned between April 1st and May 31st of any year where such employe would be eligible for a vacation allowance if they had continued working to May 31st. All requirements for vacation eligibility for such pensioned employes other than the May 31st provision will be in accordance with the regular vacation agreement.

I. The Company has the right to retire any employe at any date after he or she becomes eligible for a pension. Pension credit for service and earnings will cease after an employe has reached a pensionable status or March 1st, 1957 whichever is the later except in those cases where service beyond pensionability has been requested by the Company. Employes, upon reaching pension eligibility, shall be notified as to their status under this clause and such notification shall be noted in the Union-Management Pension Committee Minutes and noted on the personnel record of such employe.

J. In cases of physical disability and hardship, a special consideration will be recommended to the Management General Pension Board for employes who are at least sixty but less than sixty-five years of age and who have thirty or more years of continuous Plant Service.

APPENDIX K

Excerpts From Transcript of Hearing Before Arbitrator Donald A. Crawford

(1)

In the Matter of the Arbitration between

H. K. PORTER COMPANY

and

UNITED SAW, FILE & STEEL PRODUCTS WORKERS OF AMERICA, Federal Labor Union No. 22254, AFL-CIO

Bellevue Stratford Hotel
Philadelphia, Pa.
July 22-23, 1965

BEFORE: DONALD A. CRAWFORD, Arbitrator

PRESENT:

For the Company:

EDWARD W. MADEIRA, JR., ESQ.,
ALFRED CORTESE, ESQ.,
PAUL R. OBERT, ESQ., Attorneys
WALTER E. MORTON, Ind. Rel. Mgr., Phila. Wks.
ROBERT T. RAINEY, Supv. Pensions & Trusts

For the Union:

LOUIS H. WILDERMAN, ESQ., Attorney
ANTHONY WAHNER, Pres.
WILLIAM SAUERS, Sec.-Treas.

(2)

INDEX

Witness	*Direct*	*Cross*
Anthony Wahner	34	46
" " recalled	98	104
George R. Holmes	140	144
Anthony Wahner, recalled	148	—
Donald S. Grubbs	191	—
Daniel Affatato	203	207
Donald S. Grubbs, recalled	210	246

Exhibits	*Page*
Joint #1—Order & Judgment dated 12-7-64	3
" #2—Award of Arb. Buckwalter	13
" #3—Opinion of U. S. Court of Appeals	13
" #4—Opinion & order of Judge Lord, 5-10-63	13
" #5—Agreement dated 9-16-57	15
" #6—Mem. of agreement of Sept. 1956	17
" #7—Collective barg. agreement of 1948	17
" #8—List of employees	32
" #9—Form C-3317	129
Company #1—Agreement dated 9-16-59	15
" #2—Letter	45
" #3A-D—	107
" #4—	145
" #5—Personnel form of Holmes	148
" #6—Personnel form of Norcross	152
" #7—Union proposal in 1956 negotiations	171
" #8—	260
" #9—Minutes referring to Ashcroft	268
Union #1—Estimate of severance pay	92
" #2—Kheel award	93
" #3—	

" #4—Excerpts from Joint Exhibit 2 107
" #5—Form G-3300 129
" #5 (misnumbered)—"Pension Plans Under Collective Barg." 166
" #6—Excerpt from President's Pension Comm. 166

(3)

PROCEEDINGS

MR. WILDERMAN: I would like to introduce as Union's Exhibit No. 1 an order and judgment of December 7, 1964, signed by Judge John W. Lord, Jr., of the United States District Court for the Eastern District of Pennsylvania.

Mr. Madeira, you have a copy of that, do you not?

MR. MADEIRA: Yes.

MR. WILDERMAN: Paragraph 4 of this order and judgment reads as follows:

"This court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor-Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of Paragraph 1 of the arbitration award as quoted above, then either party shall apply to this court under the above caption for such action as it deems appropriate."

Following this the parties have been unable to agree as to the interpretation and application and/or

(4)

the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award.

Accordingly, the parties have agreed upon you as the Arbitrator to hear and decide as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award as quoted and set forth in this order and judgment.

THE ARBITRATOR: The court still retains jurisdiction; is that correct?

MR. WILDERMAN: The court would retain jurisdiction for the purpose of enforcing your award in these proceedings. Your award implements the order and judgment.

MR. MADEIRA: I have no objection to the introduction of that. If I could speak to Mr. Wilderman's statement, that is the order of Judge Lord, and since then we have met many times with Mr. Wilderman in attempting to work out various matters as contemplated. I feel, by the prior award of Mr. Buckwalter on these same grievances.

I would like to call the Arbitrator's attention to Section 20 (b) of the collective bargaining

(5)

agreement. If we can refer to it as the 1957 agreement because we will be talking about a 1957 and perhaps a 1959 agreement, 20 (b), which is in the pension section of the agreement, states that, "Problems of eligibility within the terms of the pension plan which cannot be solved by this pension committee shall be the only pension problems subject to arbitration, the company and the union to share in equal part the expense of the impartial arbitrator in any such cases."

There is a similar provision in the pension plan section of the collective bargaining agreement back to the adoption of the negotiated plan in 1950.

I was aware, with Mr. Wilderman, that we were coming to arbitration. I point this question to the jurisdiction of the Arbitrator in light of the background, as to whether this proceeding goes beyond eligibility of persons. I do not know the specifics of what Mr. Wilderman raises beyond the question of eligibility.

MR. WILDERMAN: I am following the order and judgment of Judge Lord, which followed the decision of the United States Court of Appeals, which followed the decision of Judge Lord rendered in the United States

(6)

District Court, which followed the award granted by Arbitrator Buckwalter. The order and judgment speaks for itself. It states that, "In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of Paragraph 1 of the arbitration award as quoted above, then either party shall apply to this court under the same option for such action as it deems appropriate"; that you are to answer these matters set forth in the order and judgment. Paragraph 1 is contained on the first page of the order and judgment.

So that you are to resolve whatever disputes may be involved relating to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of Paragraph 1 of the arbitration award as quoted in order and judgment.

MR. MADEIRA: I agree with Mr. Wilderman, that the documents that have been referred to do speak for themselves.

I am not here saying that if we get here beyond matters of eligibility that we are going to remove ourselves from the hearing. I am suggesting

(7)

that as you decide these things, these are all done with the background of the contract, and that the contract has consistently, since the pension plan was adopted, contemplated arbitration in pension matters only on matters of eligibility, and I think this limitation is expressed or explicit in Buckwalter's award where he refers to the formula being worked out among the parties.

If you don't feel that it is in the contemplation of the parties as set forth in the agreement that the Arbitrator should go into the formula, that is a decision for you to make, sir, in light of the contractual background.

MR. WILDERMAN: As we develop the case you will see that this case has a long history; that the contract has been before four courts and one arbitrator, and we are now, as I say, without the necessity of repeating myself, dealing with the order and judgment and its implementation with regard to whatever disputes exist as to the matters which I have related, contained in the order and judgment. We intend to go into each and all of these matters and not to restrict ourselves just to who is eligible. That is not what the order

(8)

and judgment says. It speaks for itself. It says let this matter finally be resolved, and we are now firmly resolving it before you, Arbitrator Crawford.

We don't anticipate, and I don't think the company wants to go through four more arbitration hearings or court proceedings ad infinitum. The time has come to allow the procedure of arbitration to have this matter finally resolved.

MR. MADEIRA: Well, the order, if you will read it, doesn't say any such thing as Mr. Wilderman claims it says. The order speaks for itself, and we can proceed with the

background that we both stated, that the issues will frame themselves. We submit that you should view the proceedings in light of 20 (b) of the 1957 agreement between the parties.

MR. WILDERMAN: We, of course, will not restrict ourselves just to the contract at that time. We have court proceedings that have intervened. We have orders and judgments. We have an arbitration award. And to say that we are now going to go back to the original contract and have you interpret the original contract is to turn back the clock approximately four or five years.

(9)

Before you today are questions, issues, matters to be resolved in accordance with the order and judgment. It is not for you to decide whether people are entitled to receive pensions or not receive pensions; that is, whether or not you are going to give anybody a pension. Pensions are vested, in accordance with Paragraph 2 of the order and judgment, and says, "Each employee, who at the time he was terminated had completed 25 years or more of service, but had not reached age 65, shall be paid a full pension." That's vested and you cannot now go to the contract to decide whether or not these people should get a pension.

The courts have said, and Arbitrator Buckwalter has said, that these people get a pension, the formula for payment to be worked out by H. K. Porter Company and the union, and does not restrict itself to only who is eligible, but the formula for payment. And that is a broad, all-encompassing situation. It is a formula. "Each terminated employee shall receive a $1000 non-contributory life insurance policy as provided for in Section XIX-A." All of this is vested. That door is closed. As the Arbitrator you cannot now decide whether or not to grant insurance, or whether or not

(10)

to grant pensions. Who gets the pension, as of whom they get their pensions, what constitutes 25 years of service or more, the computation of the pension, whether or not it's to be funded, whether or not it is to be jointly administered as a trusted fund, are all matters encompassed within the formula.

This is the formula for resolving how this money finally is going to get into the hands of these people, but whether or not they get pensions has already been decided, and there is a vested pension, and these are the matters which we are going to present to you and argue in detail and introduce testimony.

And incidentally, I don't know whether I mentioned the life insurance, but it is of course covered here, so we will go into the life insurance situation too. But as far as the courts have decided, each terminated employee shall receive a $1000 non-contributory life insurance policy as provided for in Section XIX-A.

MR. MADEIRA: We are talking in the areas, I trust, of what is being submitted to you for a decision here, and I would submit that we have grievances that were originally filed back in 1959. We have the collective bargaining agreement. We have Arbitrator

(11)

Buckwalter's award. We have the Court of Appeals opinion, and we have the order of remand that is before you as Union's Exhibit 1. And we are back here for the appropriate action of an arbitrator in light of these documents, and what has gone before you.

The way I interpret all of these matters is that here is an award which allows approximately 41 individuals eligi-

bility for full pensions and non-contributory life insurance policies when they attain 65. That's our interpretation of this award.

Now, obviously there is a disagreement on that. Mr. Wilderman brings up these other matters. I feel we can answer each contention as we go along. One of the contentions, I repeat, is how far we go in an arbitration proceeding in light of the documents that are pertinent to this hearing, and especially in light of the jurisdictional question raised by 20 (b). But with the background of these documents and the question of what is being submitted and what you are going to resolve, I think it boils down first to eligibility specifics, and I don't anticipate we will have an area of considerable disagreement on most of the employees, the specific employees who are qualified

(12)

under the award.

They are going to bring up, Mr. Wilderman says, other aspects of eligibility which there will be disagreements on. That's what we are here for.

Then if you do decide, in light of all the background documents, you go further into these things, you obviously can go further, and we feel we have got an answer for each of the points Mr. Wilderman is going to raise.

MR. WILDERMAN: Can we proceed?

THE ARBITRATOR: My jurisdiction then comes under this court order?

MR. MADEIRA: Your jurisdiction comes under all the documents.

THE ARBITRATOR: Under all the documents, including this directive of the court, and at issue here is Paragraph 2; is that correct?

MR. WILDERMAN: When you say "under this order", you are referring to the order of December 7, 1964, Mr. Crawford?

THE ARBITRATOR: Yes, Judge Lord's.

MR. WILDERMAN: Off the record.

(Discussion off the record.)

(13)

MR. MADEIRA: My understanding is that that is correct, sir, that your jurisdiction comes from all the documents, and we are particularly concerned with paragraph 2 of Union's Exhibit 1.

MR. WILDERMAN: Which is the order of December 7, 1964.

* * *

FILED
JUN 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1968 No. 1419

H. K. PORTER COMPANY, INC., *Petitioner*,

v.

UNITED SAW, FILE AND STEEL PRODUCTS WORKERS OF AMERICA, FEDERAL LABOR UNION NO. 22254, AFL-CIO, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for Respondent in Opposition

WILDERMAN, MARKOWITZ & KIRSCHNER
LOUIS H. WILDERMAN
RICHARD H. MARKOWITZ
Attorneys for Respondent

735 PSFS Building
12 South 12th Street
Philadelphia, Pa. 19107

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

INDEX

	Page
Opinion and Orders of the Courts Below	1
Jurisdiction	1
Questions Presented	1
Statement of the Case	2
Reasons for Denying Petition	9
1. There is no conflict among the circuits with regard to the questions here involved and manifestly the questions here involved do not involve such questions of law requiring decision by this Court	9
2. Unless it can be said with positive assurance that the arbitration clause or arbitration clauses are not susceptible of an interpretation that covers the asserted disputes, then arbitrability exists and the disputes are within the scope of arbitration: Doubts, if any, as to arbitrability should be resolved in favor of coverage; only the most forceful evidence of a purpose to exclude the disputes from arbitration must be forthcoming, particularly where the arbitration clause or arbitration clauses are quite broad; an arbitration award must be upheld if it can be based on any rational interpretation of the collective bargaining Agreement	10
3. The parties acknowledge that a formula for payment was to be worked out between them and, further, the parties agreed that the dispute which arose between them as to the formula for payment was to be submitted to a fresh arbitration	13

Page

4. Rule 52a of the Federal Rules of Civil Procedure does not shield or fortify the Findings of Fact and Conclusions of Law of Judge John W. Lord, Jr., of the United States District Court for the Eastern District of Pennsylvania, the lower court, because the lower court never had a trial or hearing; never saw or heard the witnesses; never had before it all of the testimony at the hearings which were all conducted by and before the Arbitrator. The lower court, in effect, arbitrarily assumed the role of the Arbitrator, decided the disputes or differences between the parties on the merits and substituted its judgment for that of the Arbitrator 16

Conclusion 18

TABLE OF CASES CITED

Anaconda Co. v. Smeltermen's Union, 402 F. 2d 749 58 L.C. ¶ 13,033 (9th Cir. 1968) 14

General Drivers etc. Local Union No. 89 v. Riss and Company 372 U. S. 517 (1963) 17

Local 719 American Bakery and Confectionary Workers v. The National Biscuit Co., 378 F. 2d 918 (3rd Cir. 1967) 15, 16

Newark Stereotypers Local No. 18 v. Newark Morning Ledger, 261 F. Supp. 832 (D.N.J. 1966), affd. 397 F. 2d 594 (3rd Cir. 1968) (cert. den. 1969) 18

H. K. Porter Co., Inc. v. United Saw Workers, 217 F. Supp. 161 (E.D. Pa. 1963) 3

TABLE OF CASES CITED—*(Continued)*

	Page
H. K. Porter Co., Inc. v. United Saw Workers, 333 F. 2d 596 (3rd Cir. 1964)	4
United Saw Workers v. H. K. Porter Co., 190 F. Supp. 407 (E.D. Pa. 1960)	2
United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960)	9
United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 593 (1960)	9
United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574 (1960)	9

RULES CITED

Federal Rules of Civil Procedure, 28 U.S.C., Rule 52a	17

OPINION AND ORDERS OF THE COURTS BELOW

The opinions and orders of the courts below are adequately set forth in the Petition.

JURISDICTION

The jurisdiction requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. In view of (1) the national policy favoring arbitration of disputes in labor matters, and (2) the absence of such questions of law requiring the decision of this Court, and (3) the absence of any conflict between the circuits with regard to the matter here involved, should the petition be granted?

2. Where both parties, at the outset and without restriction, mutually designate an arbitrator and submit to him the differences and disputes which have arisen between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment of the terms of paragraph 1 of the arbitration award of an arbitrator previously chosen by the parties as to whose award part 1 thereof had been judicially upheld, may thereafter one of the parties, the Company, at the hearing before the arbitrator attempt, equivocally as well as belatedly, to qualify the submission and thereby frustrate, abort and fragmentize the arbitration?

3. Where the labor agreement contains a broad arbitration provision, where the pension provision therein has been held by the lower court itself at a prior stage of the prolonged litigation to be vague and the arbitration clause quite broad, and where the circumstances in this case are of such a nature as to both justify and necessitate, after many years of litigation, a final resolution of the disputes or differences between the parties, did the Court of Appeals correctly hold that arbitrability was present and, further, that the arbitrator's award was within the scope of his authority?

STATEMENT OF THE CASE

The Petitioner seeks, in this action, to reverse a decision of the Court of Appeals whose judgment was entered on January 10, 1969. By its decision, the Court of Appeals reversed the judgment of the District Court with directions to enter judgment enforcing the award of Arbitrator Crawford.

This case has had a long history. In 1959, the Company announced its intention to move a large portion of its operations from its Philadelphia plant to Danville, Virginia. On behalf of the terminated employees, the Union, which was a party to a collective bargaining agreement with the Company, filed certain grievances claiming pension rights and severance pay. The agreement between the parties contained a broad grievance and arbitration clause providing for arbitration of differences between the parties as to the meaning or application of the contract. The Company objected to the arbitrability of these grievances but was finally ordered by the Honorable John W. Lord, Jr., on April 11, 1961, to submit the disputes to arbitration. *United Saw Workers v. H. K. Porter Co.*, 190 F. Supp. 407 (E.D. Pa. 1960).

Following the Order of Judge Lord in 1961, Professor W. Roy Buckwalter of Temple University was selected as the impartial arbitrator by the Union and the Company. He issued his award on August 17, 1962, as follows:

"Pensions: The Arbitrator rules that:

1. Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.

The formula for payment to be worked out by H. K. Porter Company and the Union.

Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

2. Each employee, who at the time he was terminated had reached age sixty-five, but had not completed twenty-five years of service, shall be paid a pro rata pension based on an equitable formula to be worked out by H. K. Porter Company and the Union.

Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.

3. The request for pensions for employees who, at their termination, had not put in twenty-five years of service is denied.

Severance Pay:

The Union's request for severance pay is denied." (Appendix G, p. 73a)

The Company sought to have this award vacated, but Judge Lord granted enforcement of Parts 1 and 2 on May 10, 1963. *H. K. Porter Co., Inc. v. United Saw Workers*, 217 F. Supp. 161 (E.D.Pa. 1963). This decision was appealed to the Court of Appeals by the Company. The Court of Appeals affirmed the enforcement of Part 1 of the Buck-

walter Award, but reversed as to Part 2 of the Award. *H. K. Porter Co., Inc. v. United Saw Workers*, 333 F. 2d 596 (3rd Cir. 1964). The case was remanded to the District Court with instructions to enter appropriate judgment.

On December 7, 1964, pursuant to the remand, Judge Lord entered an order and judgment, drafted jointly by the Company and the Union and submitted to Judge Lord for his approval, which provided in part:

> "2. The arbitration award of Professor W. R. Buckwalter is hereby enforced as to paragraph 1 thereof as follows:
>
> Each employee who, at the time he was terminated, had completed twenty-five years or more of service, but had not yet reached age sixty-five, shall be paid a full pension.
>
> The formula for payment to be worked out by H. K. Porter Company and the Union.
>
> Each terminated employee shall receive a $1,000 non-contributory life insurance policy as provided for in Section XIX-A.
>
> 4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award . . . then either party shall apply to this Court . . . for such action as it deems appropriate." (Appendix F, p. 70a)

In compliance with the direction of the Buckwalter Award to work out a formula for payment as per Part 1 of the Buckwalter Award which was enforced by both Judge Lord and the Court of Appeals, the Company and the Union

met in a series of conferences at which they tried to agree as to when and how much was to be paid to the employees found by Arbitrator Buckwalter to be entitled to receive pensions.

When the Company and the Union were unable to settle the issue, they mutually agreed to resolve the formula for payment by arbitration. The parties agreed that instead of going back to Judge Lord they would have Donald A. Crawford as the impartial arbitrator and agreed to have him decide, as per paragraph 4 of Judge Lord's Order of December 7, 1964, the formula for payment by having him resolve the differences or disputes which arose between the parties as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the Buckwalter arbitration award.

Hearings were held before Arbitrator Crawford on July 22 and 23, 1965. Both sides participated in these hearings. Briefs were submitted by both sides on November 6, 1965. Oral argument by both parties took place on December 16, 1965.

On January 21, 1966, the Arbitrator wrote the parties a letter stating as follows:

> "After considerable study of the record I do not interpret the award to require that a 25-year-service employee reach age 65 before he is paid a pension. I consider this issue to be a matter of interpretation within my jurisdiction. I will submit a formal opinion and award on this issue subsequently.
>
> The question of course is the threshold issue, and its determination may make it possible for the remaining issues to be resolved. To facilitate a faster resolution of the case and to avoid the possibility of further litigation, I am referring back all of the other issues raised at the hearing and in the briefs. There are (1) actuarial reduction of the pension amounts, (2) the 24-year-service group, (3) the rights of certain speci-

fied individuals, (4) interest, (5) calculation of social security, (6) funding, (7) joint administration, (8) life insurance, etc.

I am retaining jurisdiction in the event you do not want to negotiate or cannot settle the remaining issues. Should the remaining issues be referred back for an award proposals made in the court of negotiations will of course be unknown to me and therefore cannot prejudice either party." (Appendix G, pp. 75a, 76a)

Negotiations pursuant to this letter continued into May of 1966, but when the parties were unable to settle the remaining issues enumerated by Arbitrator Crawford in his letter of January 21, 1966, the parties referred the remaining unresolved issues, which are enumerated in Arbitrator Crawford's letter of January 21, 1966, back to Arbitrator Crawford for an award in accordance with his letter of January 21, 1966. On June 3, 1966, the parties had a further hearing before Arbitrator Crawford at which both parties presented witnesses as to actuarial data involved in the formula for payment and presented argument. There was no transcript taken of the hearing held on June 3, 1966: Arbitrator Crawford took his notes of the testimony.

On April 15, 1967, Arbitrator Crawford issued the following award:

"1. Grievants who at time of termination had completed 25 years of continuous service are not required to wait to age 65 for pension payments under the Buckwalter Award. The Company shall pay them full pensions effective as of the time of their termination.

2. In accordance with the Buckwalter Award, the pension allowance specified in Paragraph 1 and subsequent paragraphs of this Award shall be calculated under Section XX-D of the September 16, 1957 con-

tract, as extended September 15, 1958, without actuarial reduction. The Union request for the application of the minimum guaranteed pension for the grievants is denied.

3. The Company shall pay the grievants the total of the past due pension payments as a lump sum, calculated with the addition of four percent interest retroactively to the date of their termination.

4. Grievants who at time of termination had completed 25 years of continuous service but have since died before reaching age 65 were eligible under the Buckwalter Award for pension payments at time of termination. The Company shall pay their estates the sum of the full monthly pension payments from time of their termination to their death.

5. Grievants who at the time of termination had completed 24 years of continuous service are eligible under the Buckwalter Award to receive full pension payments upon the completion of their 25th year of continuous service. The Company shall pay them full pensions effective as of the completion of their 25th year of continuous service.

6. George Holmes and Henry Shuttleworth were terminated employees rather than quits and are therefore eligible under Paragraph 1 of the Buckwalter Award. The Company shall pay them full pensions effective as of time of termination.

7. The grievants who are eligible for pensions under the Buckwalter Award also qualify for a $1,000 non-contributory life insurance policy as of the month following their becoming eligible for pension payments and for the duration of their pensioned retirement. The Company shall pay the estates of deceased grievants the benefits due under the life insurance policy.

8. Howard Norcross and John Affatato were voluntary quits rather than terminated employees. They are therefore not eligible for pensions under Paragraph 1 of the Buckwalter Award.

9. The Union request for funding and joint administration of the pension plan is denied." (Appendix G, pp. 112a, 113a)

The Company, on May 26, 1967, moved in the Court below to vacate substantial portions, but not all, of the Crawford Award. The Union filed a cross-motion to enforce the Crawford Award in full.

Judge John W. Lord, Jr., in granting the motion of the Company, issued the following Order on April 4, 1968:

"It is ORDERED that the arbitration award of April 31, 1967 be and the same is hereby VACATED as to the following:

Paragraph 1 in its entirety.
Paragraph 2 insofar as it pertains to calculation of payment.
Paragraph 3 in its entirety.
Paragraph 4 in its entirety.
Paragraph 5 in its entirety.
Paragraph 6 insofar as it prescribes payment of pensions before the age of sixty-five.
Paragraph 7 insofar as it pertains to grievants deceased prior to their reaching age of sixty-five.

All other portions of the award be and the same are hereby ENFORCED." (Appendix H, p. 122a)

An appeal was taken by the herein Respondent to the Court of Appeals and the Court of Appeals issued its decision on January 10, 1969, reversing the judgment of the District Court with directions to enter judgment enforcing the Award of Arbitrator Crawford.

REASONS FOR DENYING PETITION

1. There is no conflict among the circuits with regard to the questions here involved and manifestly the questions here involved do not involve such questions of law requiring decision by this Court.

In essence, the Company is here asking this Court to depart from the following principles which have been judicially stated and restated in the trilogy of *United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564 (1960), *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960), and the host of decisions which flowed therefrom (1) that arbitration is favored as a means by which grievances and disputes of labor matters are to be resolved; (2) that the courts are not to weigh and reweigh the merits which have been heard and decided by the arbitrator; (3) that arbitration should be the means of achieving a final resolution of labor grievances or disputes and that arbitration should not be made a prelude to prolonged litigation; (4) that grievances or disputes should not be fragmentized thereby burdening arbitration with endless delay and interminable litigation; that the peculiar expertise of the labor arbitrator should be recognized and supported; (5) that the arbitrator's award must be upheld if it can be based upon any rational interpretation of the collective bargaining agreement; (6) that where, in addition to and/or aside from the labor agreement itself, the parties agree to submit the grievance or dispute to arbitration they are bound by the decision of the arbitrator and the arbitration, under such conditions, cannot be frustrated or aborted or subverted by a belated and equivocal attempt to change the original submission at a hearing or in its, the Company's, brief filed after the hearing before the arbitrator designated by the parties. There is nothing set forth in the

Petition which would either justify or necessitate any departure by this Court from the principles hereinabove enumerated which principles have been followed by the Court of Appeals.

2. Unless it can be said with positive assurance that the arbitration clause or arbitration clauses are not susceptible of an interpretation that covers the asserted disputes then arbitrability exists and the disputes are within the scope of arbitration: doubts, if any, as to arbitrability should be resolved in favor of coverage; only the most forceful evidence of a purpose to exclude the disputes from arbitration must be forthcoming, particularly where the arbitration clause or arbitration clauses are quite broad; an arbitration award must be upheld if it can be based on any rational interpretation of the collective bargaining agreement.

The labor agreement here involved contains, in Section III, a broad arbitration clause which provides as follows:

> "Should differences arise between the Company and the Union or any of its members as to the meaning and application of the provisions of this Agreement, or should any grievance arise between the parties hereto, there shall be no stoppage of work, strike or lockout on account of such differences, but an earnest and sincere effort shall be made by the parties hereto to settle such differences [by arbitration] . . ." (Appendix A, p. 9a)

The labor agreement here involved provides in Section XX-B (Appendix J, p. 137a) as follows:

"B. UNION MANAGEMENT PENSION COMMITTEE.

> A pension committee of three members from Management and three members from active Union Membership shall review eligibility problems and

> shall be furnished employment and earnings data on those employees who are due for retirement. Problems of eligibility within the terms of this pension plan that cannot be solved by this Pension Committee shall be the only pension problems subject to arbitration, the Company and the Union to share in equal part the expense of the Impartial Arbitrator in any such cases."

Thus, (1) there is a broad arbitration clause which speaks in terms of "should *any* (emphasis supplied) grievance arise between the parties hereto," there is to be arbitration in such grievances if it cannot be mutually resolved by the parties, and (2) under Section XX-B of the labor agreement problems of eligibility are subject to arbitration; arbitration is not restricted only to who is eligible, but arbitration is available as to *all problems* of eligibility; problems such as "eligible as of what date," etc., must be resolved as being an integral as well as a necessary part thereof. In construing these very same two clauses at any earlier stage of this dispute, Judge Lord stated:

> "In the instant case, the arbitration clause is quite broad, and the quoted clause and another reference to non-arbitrable matters are both quite vague. The Warrior opinion is replete with language which requires arbitration in such case, of which the following passage is an example:
>
> "'. . . In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad . . .'" United Saw Workers v. H. K. Porter 190 F. Supp. at p. 411-412. (Appendix A p. 10a)

As the Court of Appeals stated in this case:

> "the two questions, when an employee was entitled to pension and when the right to payment of pension

benefits accrued, are at least so interwoven in the circumstances of this case that we cannot say that §XX-B alone requires their elimination from the scope of arbitration." (Appendix I, pp. 130a, 131a)

Further, the Court of Appeals stated:

"Section XX-B must be construed in the context of the unanticipated supervening act of the company in closing the plant which made it impossible for some of the employees to continue in service until attaining the age of sixty-five. As the agreement had been written in the normal course of events an employee who had served for twenty-five years but had not yet reached the age of sixty-five could continue in his employment until both conditions were fulfilled, and would thereupon be 'eligible for pension'. Such eligibility automatically carried with it the right to immediate pension payments and there was no distinction in time between eligibility for pension and payment of pension benefits." (Appendix I, p. 130a).

In addition to the labor agreement, there was an agreement by the parties to submit to Arbitrator Crawford the differences or disputes which arose between the parties as to the interpretation and application and/or the method of enforcement including the formula for payment of the terms of paragraph 1 of the arbitration award of Arbitrator Buckwalter. Thus, the labor agreement and/or the agreement by the parties as hereinbefore described formed more than sufficient basis for sustaining the Court of Appeals in its upholding of Arbitrator Crawford's Award. Obviously, Arbitrator Crawford's Award is within the scope of his authority and draws its essence from the labor agreement and/or from the agreement at the outset by the parties to submit without restriction to arbitration the differences and disputes which arose between them as to the interpretation and application and/or the method of enforcement, including the formula for payment, of the

terms of paragraph 1 of the arbitration award of Arbitrator Buckwalter.

3. The parties acknowledge that a formula for payment was to be worked out between them and, further, the parties agreed that the dispute which arose between them as to the formula for payment was to be submitted to a fresh arbitration.

The Company had voluntarily agreed with the Union to submit the dispute relating to the formula for payment to Arbitrator Crawford. The resort to arbitration was unrestricted at the outset. As the Court of Appeals stated in its opinion "The resort to an arbitration unrestricted at the outset must be presumed to include the dispute which the parties declared would require resolution by the District Court if they were unable to settle them between themselves. It would require an express limitation to exclude from the Crawford arbitration any of these disputes. None was expressed. Indeed, during the course of the arbitration the Company acknowledged that in determining the scope of the submission Crawford was entitled to take into consideration the provisions of paragraph 4 of the judgment" (Appendix I, p. 131a).

Paragraph 4 of the judgment provides as follows:

> "4. This Court shall retain jurisdiction of the parties to and subject matter of this action under Section 301 of the Labor-Management Relations Act of 1947. In the event differences or disputes arise between the parties as to the interpretation and amplification and/or the method of enforcement, including the formula for payment, of the terms of paragraph 1 of the arbitration award as quoted above, then either party shall apply to this Court under the above caption for such action as it deems appropriate." (Appendix F, p. 70a).

In footnote 5 of the opinion of the Court of Appeals in this case the following appears:

> "5. The Arbitrator: My jurisdiction then comes under this court order?
>
> Mr. Madeira [Attorney for the company]: Your jurisdiction comes under all the documents.
>
> The Arbitrator: Under all the documents, including this directive of the court, and at issue here is Paragraph 2; is that correct?
>
> Mr. Wilderman [Attorney for the union]: When you say 'under this order', you are referring to the order of December 7, 1964, Mr. Crawford?
>
> The Arbitrator: Yes, Judge Lord's.
>
> Mr. Madeira: My understanding is that that is correct, sir, that your jurisdiction comes from all the documents, and we are particularly concerned with paragraph 2 of the Union's Exhibit 1.
>
> Mr. Wilderman: Which is the order of December 7, 1964." (Appendix I, p. 132a).

As the Court of Appeals stated, "if the authority for Crawford's decision may not be found in the collective bargaining agreement, it was clearly authorized by the definition of the scope of their dispute in paragraph 4 of the judgment which the parties transmuted into an arbitration. Such an agreement is, of course, valid and enforceable. *Cf. Anaconda Co. v. Smeltermen's Union*, 402 F.2d 749 58 LC ¶13,033 (9 Cir. 1968)" (Appendix I, p. 132a).

The Company did not restrict the resort to arbitration before Arbitrator Crawford at the outset. Thus, the Company was bound to have all of the issues relating to the formula for payment heard and decided by Arbitrator Crawford. The Company's attempt at the hearing before Arbitrator Crawford to restrict Arbitrator Crawford to deciding only who was eligible to receive pensions, which issue had already been decided by Arbitrator Buckwalter, was both belated and equivocal. Appendix K shows with equal clarity that the Company did not object to having

Arbitrator Crawford hear and decide all of the issues involved in the formula for payment; the Company realized quite clearly at the hearings held by Arbitrator Crawford that he was going to proceed to hear and decide all of the issues. Further, note that the Company as well as the Union referred back to Arbitrator Crawford *all* of the issues enumerated in Arbitrator Crawford's letter of January 21, 1966, and that following this referral back to Arbitrator Crawford of *all* of the enumerated issues, Arbitrator Crawford held a further hearing on June 3, 1966, at which hearing the Company, as it did in the hearings held by Arbitrator Crawford on July 22 and 23, 1965, presented witnesses who testified as to *all* of the issues involved in the formula for payment to be decided by Arbitrator Crawford.

The Company's attempt to rely upon *Local 719 American Bakery and Confectionary Workers v. The National Biscuit Co.*, 378 F. 2d 918 (3 Cir. 1967) is both unavailing and misguided. The Court of Appeals held that "the case is clearly distinguishable from *Local 719 American Bakery and Confectionary Workers v. The National Biscuit Co.*, 378 F. 2d 918 (3 Cir. 1967), where we held that the union's objection to arbitrability, which it had made at the very outset and continued to preserve throughout the process of arbitration, was not lost because of its participation in the arbitration proceeding. Here, instead of an objection at the outset of the arbitration, there was agreement and acquiescence to the arbitration" (Appendix I, p. 132a).

Further, in *Local 719 American Bakery and Confectionary Workers v. The National Biscuit Co.*, supra, the Court of Appeals condemned an attempt to resist arbitrability with what is at best a weak semantic parry entirely insufficient to overcome the presumption in favor of arbitrability mandated by Supreme Court decision in *United States Workers of America v. Warrior and Gulf Navigation Co.*, 363 U. S 574 (1960). In our case the Company's attempt at the hearing to resist arbitrability of any issue other than who was eligible for pensions was at best a weak, semantic parry entirely insufficient to overcome the

presumption in favor of arbitrability; in addition the Company's attempt was both belated and equivocal. Further, in *Local 719 American Bakery and Confectionary Workers v. The National Bisouit Co.*, supra, the Court of Appeals required that the objection made by a party at a hearing to an arbitrator's jurisdiction be stated with equal clarity. Appendix K shows that the belated and equivocal objection by the Company at the hearing before Arbitrator Crawford was not made with equal clarity. Finally, in *Local 719 American Bakery and Confectionary Workers v. The National Biscuit Co.*, supra, the Court of Appeals decided that with regard to the arbitrator's award which was supported by past practices, the Court of Appeals made no inquiry into the quality or persuasiveness of the practices found to exist; in our case Arbitrator Crawford has found there to be past practices in support of the Union's position, and the Company admits that there were past practices to support the Union's position. Therefore, the Company's attack upon the quality or persuasiveness of the past practices is unavailing because, as the Court of Appeals held in *Local 719 American Bakery and Confectionary Workers v. The National Biscuit Co.*, supra, there can be no inquiry into the quality or persuasiveness of the past practices which have been here found to exist by Arbitrator Crawford.

4. **Rule 52a of the Federal Rules of Civil Procedure Does not shield or fortify the findings of fact and conclusions of law of Judge W. Lord, Jr., of the United States District Court for the Eastern District of Pennsylvania, the lower court, because the lower court never had a trial or hearing, never saw or heard the witnesses, never had before it all of the testimony at the hearings which were all conducted by and before the Arbitrator. The lower court, in effect, arbitrarily assumed the role of the arbitrator, decided the disputes or differences between the parties on the merits and substituted its judgment for that of the arbitrator.**

It is well established that the courts must not review or reweigh an arbitrator's award on the merits and to substitute its judgment for that of the arbitrator. *General Drivers, etc., Local Union No. 89 v. Riss and Company*, 372 U. S. 517 (1963). The lower court arbitrarily assumed the role of arbitrator in this case and, in reality, reviewed Arbitrator Crawford's Award on the merits and substituted its judgment for that of Arbitrator Crawford. To compound that error the lower court issued findings of fact and conclusions of law without having any trial or hearing before the lower court. All of the hearings were conducted before Arbitrator Crawford. Even though the transcript of the hearings held before Arbitrator Crawford on July 22 and 23, 1965, were put into the record by the Company over the objection of the Union, which contended that the court did not have the right to review Arbitrator Crawford's Award on the merits, the transcript introduced by the Company was not the complete record because it contained none of the testimony introduced before Arbitrator Crawford on June 3, 1966, at which hearing the testimony was not recorded. Thus, if we assume that Judge Lord, who arbitrarily substituted himself in place of Arbitrator Crawford over the stated objection of the Union, proceeded to use the transcript of the hearings before Arbitrator Crawford as the basis for his findings of fact, he did not have all of the testimony before him. Further, Judge Lord neither saw nor heard the witnesses who testified before Arbitrator Crawford and was thus in no position to judge as to the credibility of the witnesses. Accordingly, to put it mildly, the Company's attempt to rely on Rule 52a of the Federal Rules of Civil Procedure, 28 USC Rule 52a, is both incorrect and misguided. Since it was Arbitrator Crawford who conducted the hearings, heard and saw the witnesses and judged the credibility of the witnesses then, by analogy, it is Arbitrator Crawford's findings of fact and conclusions of law which should be strongly supported by Rule 52a of the Federal Rules of Civil Procedure. Furthermore, even

if, which is denied, Arbitrator Crawford was mistaken in law and erroneously evaluated the evidence, his evaluations may not be discarded by the lower court because there exists a strong presumption favoring the validity of an arbitration award, for an arbitrator's award must be the end and not the commencement of litigation. *Newark Stereotypers Local No. 18 v. Newark Morning Ledger*, 261 F. Supp. 832 (D.N.J. 1966), *affd.* 397 F. 2d 594 (3rd Cir. 1968) (cert. denied 1969). In this case, Arbitrator Crawford was not mistaken in law and did not erroneously evaluate the evidence.

CONCLUSION

The Petitioner has advanced no adequate reason for the granting of its Petition for Writ of Certiorari. There is no conflict among the circuits with regard to the questions here involved and manifestly the questions here involved do not involve such questions of law requiring decision by this Court. The foregoing should suffice as a basis for denying the Petition for a Writ of Certiorari; however, the Respondent has stated questions two and three and has set forth its answers and supporting arguments in order to make it clear beyond any doubt that there is no basis for the granting of the Petitioner's Writ of Certiorari and that the decision of the Court of Appeals is correct, is supportive of arbitration and is consistent with this Court's stated and restated position favoring arbitration as a means by which to resolve disputes in labor matters.

Respectfully submitted,

WILDERMAN, MARKOWITZ & KIRSCHNER,
LOUIS H. WILDERMAN,
RICHARD H. MARKOWITZ,
Attorneys for Respondent